competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 76/CR/NOV09

In the matter between:

COMPETITION COMMISSION	**Applicant**
And	
GEOMATIC QUARRY SALES (PTY) LTD t/a Quarry Co	**1st Respondent**
DERBY CONCRETE (PTY) LTD t/a Denron	**2nd Respondent**
ROBBERG QUARRY CC t/a Robberg Quarry	**3rd Respondent**
DENRON QUARRIES (PTY) LTD t/a Denron Quarries	**4th Respondent**

Panel	:	Yasmin Carrim(Presiding Member), Andreas Wessels(TribunalMember) Takalani Madima(Tribunal Member)
Heard on	:	06 June 2011
Order issued on	:	07 June 2011
Reasons issued on	:	15 June 2011

Reasons for Decision and Order

Introduction

[1] On 6 June 2011 the Competition Tribunal ("the Tribunal") dismissed the Competition Commission's ("the Commission") complaint referral on the basis that the time limit of

one year contemplated in section 50(2) of the Competition Act, 1998 (Act No.89 of 1998, as amended) ("the Act") had expired and the extensions agreed to between the Commission and the complainant were not valid. What follows below are the reasons for that decision.

Background

[2] On or about 23 August 2007, the Commission received a complaint from one Andrew Schmidt ("Mr Schmidt / the complainant"), on behalf of Lafarge SA Limited ("Lafarge")). Mr Schmidt was at the time, a business unit manager at Lafarge.

[3] Schmidt's complaint was that:

> *"Plettenbergbay has only 2 (sic) quarry operators (Denron and Robberg Quarry) who (sic) mine all aggregates (sand and stone) and all road building materials in the Plettenbergbay market. The 2 quarries do not sell directly to the public or customers but has (sic) set up an outlet who (sic) handles all sales on their behalf. The outlet is called QuarryCo. By selling their products through this outlet, the 2 (sic) quarries fix all product prices to all customers and deny the market of competitive pricing.*
>
> *This method of price fixing has been operational in the Plettenbergbay area for more than three years and customers has (sic) since its inception not been afforded the choice between 2 (sic) different prices for quarry products from the 2 (sic)operators".*[1]

[4] On receipt of the complaint, the Commission commenced formal investigations in terms of section 49B(3) of the Act. It would appear that the Commission was not in a position to conclude its investigation of the complaint in the requisite timeframes provided for in section 50(2) of the Act.

[5] The Commission caused to be signed by the complainant certain "agreements" that purported to extend the timeframes allowable in terms of section 50(2) of the Act.[2] The first of these agreements is dated 21 August 2008, and was faxed by complainant, and received by the Commission at 16:29 on the same day ("the first extension"). The complainant agreed to an extension of the time period for the investigation of his complaint to 30 November 2008.[3]

[6] It appears that on 26 November 2008, the Commission again requested the complainant to agree to a further extension of the time period for the investigation to

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[1] Pleadings bundle, page 20.
[2] Pleadings bundle, pages 21-24.
[3] Pleadings bundle, page 21.

28 February 2009 ("the second extension"). The complainant acceded to the Commission's request and faxed the "agreement" to the Commission on 27 November 2008.[4]

[7] By February 2009, the Commission still had not completed its investigations of the complainant's complaint. Therefore the complainant was again requested by the Commission to agree to a further extension of the time period for the investigation to 31 August 2009 ("the third extension"). Once again the complainant complied[5] and a further agreement to the extension of the time period until 30 November 2009 was signed by the complainant on 27 August 2009[6], but only faxed to the Commission on 3 March 2009.

[8] On 31 May 2011, and prior to the hearing, Mr R. Labuschagne, the attorney for Second and Fourth Respondents wrote to the Commission and advised that he intended raising a number of points *in limine* at the commencement of the hearing of this matter. The first of these was listed as "*The time period for the Commission's investigation has lapsed as the extensions granted to the Commission attached as Annexure "FA2" to the complaint referral do not comply with the prescribed requirements*". Mr R. Sohn, the attorney for Third Respondent was copied on this email.

[9] Mr K. Modise, of the Commission, replied on 2 June 2011 that "*We have considered the points you propose to take as set out below, our view is all seem points (sic) that appropriately require determination by the Tribunal after argument.* [7]"

[10] Hence it could come as no surprise to the Commission that this Tribunal would be asked to consider a number of points *in limine* ahead of this hearing of the merits of the matter.

[11] At the commencement of the hearing Mr Labuschagne and Mr Sohn requested us to consider the points *in limine* prior to hearing any evidence on the merits. The Commission persisted with its previously held position that the points should be argued at the end of the hearing. The Commission argued further that the respondents could not raise the issue of a section 50(2) non-compliance since this had not been pleaded. Mr Labuschagne however pointed us to paragraph 7 of the Second and Fourth Respondents' answering affidavit wherein it was stated that "*The*

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[4] Pleadings bundle, page 22.
[5] Pleadings bundle page 23.
[6] Pleadings bundle page 24
[7] This was a response by the Commission to the Respondents in an Email dated 2 June 2011.

period referred to in section 50(2) of the Act was never extended and the Applicant must be regarded as having issued a Notice of Non-Referral on the expiry of the relevant period on 21 August 2008".[8]

[12] In our view this was clearly a challenge to the Commission who regrettably did not rise to it, either in reply, or in subsequent correspondence. We permitted the respondents to put forward their arguments.

[13] Mr Labuschagne and Mr Sohn submitted that the first extension was invalid as it was obtained after the period of extension allowed in terms of section 50(2) of the Act had expired. Their further submission was that while section 50(4) of the Act provides that the Commission and the complainant may agree to extend the one year period allowed in terms of section 50(2), such extension must take place within the one year period after the initial complaint was submitted to the Commission. This had not occurred, and the Commission had not issued a notice of non-referral within the time contemplated in subsection (2). The Commission must then be regarded as having issued a notice of non-referral on the expiry of the one year period, so it was submitted.

[14] Mr Sohn submitted that the one year period started running from 16:31 on 21 August 2007 when the Commission received the complaint from the complainant. The year in question came to an end at 16:30 on 20 August 2008. The first extension of time was agreed to by the complainant on 21 August 2008 and faxed to the Commission at 16:29. This, it was argued, was a day too late. The applicant was out of time and Third Respondent was entitled to receive a notice of non-referral from the Commission.

The Commission's response

[15] Mr Modise, representing the Commission, submitted that the Commission was faced, with regard to prescription, with bold allegations of non-compliance.[9] Mr Modise argued that there was nothing wrong with the extensions, and nobody has said so. In response to the question why the Commission never communicated with Respondents regarding the allegations of non-compliance or the deposition of a replying affidavit with regard to the issue of prescription, Mr Modise stated that it was an attempt by the Respondents to "*.... ambush the Commission. Whether or not this point had been pleaded, the character was deliberately concealed from the Commission to try and ambush it*

[8] Pleadings bundle page 44, paragraph 7, Record page 9, line 14
[9] Record page 40, lines 12-13

today in a point in limine".[10] Mr Modise submitted further that Second and Fourth Respondents "..... *say they have pleaded the matter. The fact is that it was a bare denial. It is just as good as saying we deny this point and how should we plead a bare denial. Should we go back to say we have extended the matter? How would this have taken this matter forward?*"[11]

[16] The thrust of Mr Modise's argument was that the prescription issues raised by the Second and Fourth Respondents in their answering affidavit were bare denials and the Commission, as submitted by Mr Modise "..... *can't take it any further*".[12] He objected to the manner in which the prescription point was raised and brought before the Tribunal. He further argued that it was a substantial issue which should have been brought before the Tribunal by way of motion. He sought to have the issue of prescription and other points *in limine* heard at the end of the trial, that is, the leading of evidence by the parties. Mr Modise's request was defeated and the Tribunal stated that it wanted to "... *hear your response to the prescription point at least*".[13]

[17] The Commission was granted an indulgence of time to prepare for argument, and with the agreement of Mr Labuschagne, was permitted to consult with the complainant if it so wished.[14]

The provisions of section 50 of the Act

[18] Section 50 of the Act provides that

> *(1) "At anytime after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.*
>
> *(2) Within one year after a complaint was submitted to it, the Commissioner must –*
>
> *(a) Subject to subsection (3), refer the complaint to the Competition Tribunal, if it determines that a prohibited practice has been established; or*
>
> *(b) In any other case, issue a notice of non-referral to the complainant in the prescribed form.*

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[10] Record page 41, line 17
[11] Record page 42, lines 15-19; page 43, line 12.
[12] Record page 43, line 2
[13] Record page 47, line 21
[14] The complainant, Mr Andrew Schmidt was present in the proceedings under subpoena at the behest of Second and Fourth Respondents.

(3) When the Competition Commission refers a complaint to the Competition Tribunal in terms of subsection (2) (a), it -

(a) may -

(i) Refer all the particulars of the complaint as submitted by the complainant;

(ii) Refer only some of the particulars of the complaint as submitted by the complainant; or

(iii) Add particulars to the complaint as submitted by the complainant; and

(b) must issue a notice of non-referral as contemplated in subsection (2) (b) in respect of any particulars of the complaint not referred to the Competition Tribunal.

(4) In a particular case -

(a) the Competition Commission and the complainant may agree to extend the period allowed in subsection (2); or

(b) on application by the Competition Commission made before the end of the period contemplated in paragraph (a), the Competition Tribunal may extend that period.

(5) *If the Competition Commission has not referred a complaint to the Competition Tribunal, or issued a notice of non-referral, within the time contemplated in subsection (2) or the extended period contemplated in subsection (4), the Commission must be regarded as having issued a notice of non-referral on the expiry of the relevant period.*

[19] Section 50(4)(a) does not specify the manner in which consent to an extension should be negotiated, concluded or recorded.[15] It is permissible for the Commission and the complainant to can orally agree to an extension of the period for investigation. This can be done via the telephone. Written communication in this regard would however come in handy in the event of a dispute such as the one in these proceedings.

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[15] Case no.09/CR/Jan07

[20] Mr Modise argued that the actual agreement between the complainant and the Commission to extend the period of investigation was an oral agreement obtained telephonically and that the signed fax was a mere confirmation of the oral agreement.

[21] The Commission called Mr Schmidt to lead evidence on the various extensions purportedly agreed to by him. Mr Schmidt testified that about a year after having submitted his complaint, he received a call from the Commission. He could not recall who from the Commission had called him. He was informed that there was an extension of time needed for the investigation of his complaint. The Commission sent him a fax which he signed and faxed back.[16]

[22] Mr Schmidt testified further that "*.... Everytime before I received a fax, I got a phone call saying that either a year has passed or three months has passed. If this investigation needs to continue, I need to sign authority or give my consent so that it can continue*".[17] He emphasised in his evidence that he received these phone calls before the relevant time periods for investigation in this matter lapsed.[18]

[23] During cross examination Mr Schmidt conceded that he did not recall the identity of the person from the Commission who had called him with regard to any of the extensions[19], but recalled that a telephone call always preceded his signing of an extension[20] of the investigation time period. He could also not recall the dates on which he had received these telephone calls from the Commission.

[24] With regard to the first extension, Mr Schmidt conceded that a conversation with someone from the Commission could have taken place on the same day, namely, 21 August 2008, that he faxed the Commission the signed agreement.

[25] No other evidence was led by Mr Modise who stated that the Commission might have to discover "*...all the Commission records to Mr Schmidt ....*" he continued and submitted that however this was not the issue. "*The issue is do you know where you are sitting that the complainant that sat before you wanted this matter to proceed or not? This is the question that the Tribunal today needs to address itself to ....*"[21]

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[16] Record page 53, lines11-16
[17] Record pages 53-54, lines 20 - 1
[18] Record page 59, line16; Record page 65, line 17
[19] Record pages 65-66, lines 1-20
[20] Record page 65, line 23
[21] Record page 92, lines 1-5

[26] His insistence that the extension of the investigation timeframes is a matter between the Commission and the complainant and had nothing to do with the Respondents is misplaced. He appeared to be arguing the wrong case right. He failed to appreciate the fact that if the first extension was out of time, all other purported extensions, that is, the second to the fourth are invalid as well.

The Tribunal's past position

[27] The Tribunal has on occasion dealt with a not too dissimilar situation as obtains in the instant proceedings. In Competition Commission v Allen Meshco & Others[22], the Tribunal held that, "*The one-year limitation in section 50(2) is there for the benefit of the complainant: it helps to ensure that a complaint is speedily attended to by the Commission and not unduly dragged out. An astute complainant will only consent to an extension on being satisfied by the Commission that there is good reason for it, and has the power to bargain with the Commission over the extra time needed by way of extension. In the application of section 50(2) it is accordingly necessary to look to the interests of the complainant in the first place in ensuring that the section has been correctly and fairly implemented. In these circumstances it is clear that the Commission's duty to attend to the task of negotiating and obtaining necessary consents to extensions is a serious one, and that there is moreover a corollary administrative duty of maintaining complete, accurate and accessible records of all extensions concluded*".[23]

[28] In that case the Tribunal held that there was no break in the chain of extensions that had been agreed to between the complainant and the Commission. However the Tribunal also stated that "*However the case has not revealed the procedures and record-keeping of the Commission in a reassuring light*".[24]

[29] We appreciate the argument that the time frames contemplated in section 50(2) are there for the benefit of the complainant. At the same time, Competition Tribunal Rule 14(1)(b) requires a complainant to file its complaint referral within 20 business days of the Commission's notice of non-referral or deemed non-referral. A complainant's rights may be adversely affected if there is uncertainty about the date of non-referral or deemed non-referral. Moreover it does not help the Commission to suggest that a respondent has no interest in knowing whether or not an investigation against it is ongoing or due for self-referral. It is incumbent on the Commission, acting in the public interest, to ensure that all interested parties, whether these are complainants or respondents, have certainty about whether a matter is still under investigation or has been non-referred.

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[22] Case no.09/CR/Jan07
[23] Case no.09/CR/Jan07, paragraph 29
[24] Case no.09/CR/Jan07, paragraph 29

[30] The confusion resulting from the lateness of the first extension can be attributed to the Commission's failure to heed the Tribunal's advice in the Meshco case. The Tribunal suggested that "*...a thorough review by the Commission of its practices in regard to extensions under section 50 is required. It is accordingly urged on the Commission that it takes this matter to hand*".[25] It does not appear that the Commission has heeded the Tribunal's advice.

[31] Unless a policy decision is taken by the Commission to properly record all communication with a complainant regarding matters of extensions, these problems shall not abate. However we do not wish to prescribe to the Commission how it should go about doing its work. As already stated above, the Act does not stipulate whether the agreement between the Commission and the complainant for the extension of the investigation period should be oral or in writing. It appears that the Act permits either. In the event of an oral agreement for extension, it would be prudent for the Commission to adopt a practice whereby the complainant confirms the actual date of the oral agreement in some form of writing, say by Email, preferably on the same day as the date of the oral agreement.

[32] In the absence of such unambiguous communication, combined with a high turnover of officials, such an approach however may constantly be plagued by debates as to the effective date of the agreement, as the case in point. An unambiguous approach may be to rely on the date of written documents as the effective date of agreements to extend, provided of course that these are received by the Commission sufficiently in advance of the expiry date to avoid the risk that was clearly present in this case.

[33] Even if we were to accept, for argument's sake, that the Commission obtained an oral agreement from the complainant prior to requiring a written confirmation, the concession by Mr Schmidt and the failure by the Commission to put up any further evidence leaves us with little choice but to come to the conclusion that the first extension was out of time and all the subsequent extensions invalid.

Order

[34] In the circumstances we make the following order:

(1) The applicant's complaint referral against the Second, Third and Fourth Respondents to the Competition Tribunal on or about 06 November 2009, under

[25] Case no.09/CR/Jan07, paragraph 32

sections 4(1)(b)(i) and 5(2) of the Competition Act 89 of 1998, is set aside on the grounds that the one year time period contemplated in section 50(2) had not been extended in terms of section 50(4)(a); and

(2) There is no order as to costs.

Takalani Madima

15 June 2011
DATE

Yasmin Carrim and Andreas Wessels concurring.

Tribunal Researcher:	Ms T Hlafane
For the Applicant:	Mr K Modise
For the 2nd and 4th Respondents:	Mr R Labuschagne of Bowman Gilfillan Inc
For the 3rd Respondent:	Mr R Sohn of Sohn & Associates

Tebogo Mputle

From: Tebogo Mputle
Sent: Wednesday, June 15, 2011 2:38 PM
To: Alicia Hlafane; 'Rudolph Labuschagne'; Khotso Modise
Cc: Lerato Motaung; Thabani Ngilande; 'Richard@smmd.co.za'; 'Richard@seaqual.co.za'
Subject: Commission v Geomatic Quarry Sales & Three Others (76/CR/Nov09)
Attachments: 20110615142752595.tif

Dear Sirs

Please see attached decision and order and kindly confirm receipt.

Regards

Tebogo Mputle

Tebogo Mputle
Registry Administrator
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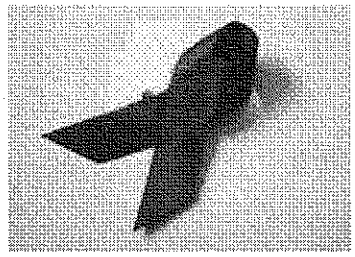

Tracking: