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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR120Aug13/OTH192Dec14

In the matter between:

THE COMPETITION COMMISSION	Applicant
And	
SAM LOUW N.O.	First Respondent
ANITA LOUW N.O.	Second Respondent
WELKOM KEY CENTRE CC	Third Respondent

Panel	: Norman Manoim (Presiding Member) : Mondo Mazwai (Tribunal Member) : Prof. Imraan Valodia (Tribunal Member)
Heard on	: 05 June 2015
Date of last submission	: 02 July 2015
Order Issued on	: 23 July 2015
Reasons Issued on	: 23 July 2015

Reasons for Decision and Order

Introduction

[1] On 18 December 2014, the Competition Tribunal ("the Tribunal") issued a decision in which it found that Sam Louw N.O., Anita Louw N.O. (trading as Louw's Key Centre) ("Louw's Centre") and Welkom Key Centre CC ("Welkom Centre") (collectively "the respondents") contravened section 4(1)(b)(ii) of the Competition Act, 1998 ("the Act") by entering into an agreement to divide the Free State and Northern Cape markets for the supply and distribution of security cylinders, matching keys, padlocks, electronic and multipoint locks.

[2] Following this finding, the Competition Commission ("Commission") filed an application in terms of section 59(2) of the Act for an administrative penalty against the respondents. This is our order and reasons for the remedies imposed.

Background to the application

[3] Initially, the hearing on remedies was set down on 02 April 2015 by agreement among all the parties involved. However, a few days prior to the hearing date, we were advised by the respondents that the legal representative that acted for both of them in the hearing on the merits had withdrawn from the case. Welkom Centre indicated that it was in the process of finding a new legal representative and requested our assistance in this regard.

[4] Assisted by the Tribunal registrar Welkom Centre secured legal representation by Edward Nathan Sonnenbergs Inc ("ENS") on a *pro bono* basis. In light of the late change in legal representation for Welkom Centre, the respondents requested that the remedies hearing scheduled for 02 April 2015 be converted to a pre-hearing. ENS attended the pre-hearing on Welkom Centre's behalf (with Mr Shawe in attendance). Mr Louw did not attend the pre-hearing nor did he have legal representation. At this pre-hearing the date for the hearing on remedies was scheduled for 05 June 2015.

[5] The Commission and respondents duly filed their submissions on remedies prior to the remedies hearing, as directed at the pre-hearing. Prior to the commencement of the remedies hearing, we invited the Commission and respondents to explore remedies other than administrative penalties, aimed at the eradication of the cartel. The Commission and the parties indicated their willingness to explore such remedies and to revert by 03 July 2015 with any proposals. We proceeded to hear the Commission's and respondents' submissions on administrative penalties, in case they were unable to reach

agreement on alternative remedies. We deal with the submissions on administrative penalties below.

Relevant provisions of the Act

[6] Section 58 of the Act provides that:

"(1) In addition to its powers in terms of this Act, the Competition Tribunal may –

(a) make an appropriate order in relation to a prohibited practice, including –

(i) …

(iii) imposing an administrative penalty, in terms of section 59, with or without the addition of any other order in terms of this section;"

[7] Section 59(2) provides that:

"An administrative penalty imposed in terms of sub-section (1) may not exceed the firm's turnover in the Republic and its exports from the Republic during the firm's preceding financial year."

[8] Section 59(3) provides that: *"When considering an administrative penalty, the Competition Tribunal must consider the following factors:*

(a) the nature, duration, gravity and extent of the contravention;

(b) any loss or damage suffered as a result of the contravention;

(c) the behavior of the respondent;

(d) the market circumstances in which the contravention took place;

(e) the level of profit derived from the contravention;

(f) the degree to which the respondent has co-operated with the Commission and the Competition Tribunal; and

(g) *whether the respondent has previously been found in contravention of this Act."*

[9] We have previously formulated a methodology for assessing and calculating an administrative penalty in the matter between the Competition Commission and Aveng Africa Limited t/a Steeledale and Others ("the *Aveng* case)[1]. We

[1] Case no. 84/CR/Dec09 and 08/CR/Feb11

will deal with this methodology in conjunction with the parties' submissions in that regard.

The parties' submissions

[10] The parties applied the methodology in the *Aveng* case, which is a six-step methodology, as summarised below.

a. Step one: determination of the affected turnover in the relevant year of assessment. It is common cause that the affected turnover is that for the supply and distribution of security cylinders, matching keys, padlocks, electronic and multipoint locks. It is also common cause between the Commission and the respondents that the relevant financial year for the assessment of the affected turnover is 2014.

b. Step two: calculation of the 'base amount,' being that proportion of the relevant turnover relied upon. We have previously held that the base amount can range between 0-30% depending *inter alia* on the factors set out in section 59(3). The Commission has submitted that the highest proportion of turnover be allocated as a base amount as market division is an egregious form of contravention. However, the Commission has not provided a specific amount within this range. Welkom Centre has submitted that 5% be allocated as the base amount for reasons we will discuss below. Louw's Centre has not made any submissions on the methodology.

c. Step three: where the contravention exceeds one year, multiplying the amount obtained in step two by the duration of the contravention. It is common cause between the Commission and the respondents that the period of the contravention is 15 years.

d. Step four: rounding off the figure obtained in step three, if it exceeds the cap provided for by section 59(2). There is no dispute between the Commission and the parties in this regard.

e. Step five: considering factors that might mitigate or aggravate the amount reached in step four, by way of a discount or premium expressed as a percentage of that amount that is either subtracted from or added to it. Welkom Centre submits that a discount of 90% in mitigation of the penalty is appropriate. The Commission has not provided any number to discount off the penalty amount, other than to disagree with the 90% proposed by Welkom Centre.

f. Step six: rounding off this amount if it exceeds the cap provided for in section 59(2). If it does, it must be adjusted downwards so that it does not exceed the cap. There is no dispute between the Commission and the respondents in this regard.

[11] The essence of the Commission's submission is that a 10% administrative penalty be imposed on the respondents respectively as market division is an egregious form of contravention from which the respondents must be deterred.

[12] As mentioned, Welkom Centre submits that in respect of step two, a base amount of 5% (within the stipulated range of 0-30%) is appropriate. In respect of step five, Welkom Centre submits that a 90% discount on the penalty amount is appropriate. Welkom Centre relies *inter alia* on the following mitigating factors:

a. The market division was born out of a naïve but nevertheless benevolent and well intentioned attempt by the incumbent (Louw's Key Centre) to assist a new entrant (Welkom Key Centre), both of whom did not know that the conduct was unlawful. Moreover the agreement came into effect in 1988, before the commencement of the Act in September 1999;

b. Over time, the significance of the agreement has waned as Welkom Centre has on numerous ocassions serviced areas which were

historically allocated to Louw's Centre, despite the added costs to the customer.

c. The locksmith market is characterized by trust as it pertains to security. Generally, once a customer has used a locksmith, they tend to use the same locksmith because of the trust relationship that has developed. In some cases, as a security measure, only a locksmith that has installed a lock can open it, thus creating a natural barrier to switching.

d. Welkom Centre has not derived any profits from its conduct.

e. Welkom Centre has co-operated with the Commission in that it has been open, honest and forthcoming and should not be punished for the shortcomings of the legal advice it relied on. Welkom Centre concedes that a quick and early settlement of the matter would have been preferable to the litigation that ensued.

f. Welkom Centre has not been found to have previously contravened the Act.

[13] As mentioned Louw's Centre was not legally represented. Mr Louw made an offer to pay an administrative penalty in the amount of 1% of sales for Mul-T-Lock products. However, the affected turnover is wider than Mul-T-Lock products. With the assistance of ENS, Mr Louw has since provided the correct affected turnover information.

[14] Subsequent to the hearing on remedies, the respondents reverted with alternative remedies as they had undertaken. The remedies include a requirement that the respondents' customers be informed that the respondents have been found to have contravened the Act through market division (the respondents have each provided a list of their customers to the Commission); and weekly advertisements by the respondents of their

businesses in a newspaper(s) that circulates in both their territories. The respondents have requested that these alternative remedies be imposed in lieu of an administrative penalty, alternatively, in reduction of any administrative penalty that the Tribunal may decide to impose.[2]

[15] The Commission has advised that it received the respondents' alternative remedies too late to make submissions by 3 July 2015 as undertaken. The Commission submits however that even if the alternative remedies were to be found to be acceptable to the Tribunal, an administrative penalty should nevertheless be imposed on the respondents.

Our assessment

[16] As mentioned, the Commission submits that each respondent should be ordered to pay an administrative penalty in the amount of 10% of the affected turnover. In the event that alternative remedies are imposed, the Commission submits that this could serve to mitigate the fine, but has not provided any specific calculation or percentage reduction in the fine. While we agree with the Commission that market division is an egregious form of contravention, the maximum penalty contended for by the Commission is not warranted in this case. Even some of the most pernicious contraventions of section 4(1)(b) have not attracted a 10% fine[3].

[17] We have taken into account the mitigating factors presented by Welkom Centre summarised in paragraph [12] above, and are persuaded by them. Moreover, it is trite that competition harm is presumed in any section 4(1)(b) contravention. However, quantifying that harm necessitates an assessment of the counterfactual i.e. what would the state of competition be absent the market division. This is unknown. The Commission has alleged that the respondents' conduct has had exclusionary effects in the market as many

[2] See letters dated 26 June 2015 and 02 July 2015, paragraphs 6 and 7 in Welkom Centre and Louw's Centre submissions respectively.
[3] See *inter alia* Competition Commission vs. DPI Plastics (Pty) Ltd & Others, Case no: 15/CR/Feb09; Competition Commission vs. Southern Pipeline Contractors Conrite Walls (Pty) Ltd, Case no: 23/CR/Feb09.

locksmiths have entered and exited the market[4]. However, no empirical evidence of this was presented to us.

[18] In the circumstances, we are of the view that a remedy that seeks to deter the respondents from the impugned conduct coupled with the alternative remedies mentioned in paragraph [14] is more appropriate. The alternative remedies more likely redress any harm that may have been caused by the market division between the respondents, than an administrative penalty alone.

[19] One alternative remedy proposed by the parties was that they would undertake to spend a certain sum on the training of an apprentice. Whilst training of new entrants is always welcomed this did not amount to sponsoring the entry of a new competitor in the affected area nor did it seem to go beyond the training that the business may in any event have engaged in. We have therefore not had regard to this proposal as constituting an appropriate alternative remedy.

[20] Advertising outside their respective historically allocated markets as well as information in the respondents' customers' hands of an anti-competitive finding against the respondents, provides the possibility of a demand-side response by the customers. We have therefore decided to impose a two-fold remedy comprising an administrative penalty and conditions aimed at redressing the market division.

[21] In the case of Welkom Centre, the administrative penalty has been determined on the basis of Welkom Centre's calculation. The affected turnover for the financial year 2014 is R895 816.84 (step one). We have decided to allocate 5% of the affected turnover as the base amount, which amounts to R44 790.80 (step two). The base amount (R44 790.80) is multiplied by 15, being the number of years of the contravention (step 3), which is R671 862.00. Welkom Centre's turnover for the financial year 2014 was R4 112 740.00 (of which 10% is R411 274.00). The figure arrived at in

[4] See transcript of 13 October 2014, pages 99-100.

step 3 (R671 862.00) exceeds 10% of Welkom Centre's annual turnover in 2014. This figure is therefore substituted with the annual turnover figure which is R411 274.00 (step 4). Given the mitigating factors discussed above, we have given a 90% discount on the amount arrived at in step 4, which gives a figure of R41 127.40 (step 5). This amount (R41 127.40) does not exceed the statutory cap of 10% of Welkom Centre's total turnover in 2014 (step 6). The penalty amount is thus R41 127.40.

[22] We have applied the same methodology to Louw's Centre. Louw's Centre's affected turnover for the financial year 2014 is R2 755 074.54 (step one). We have allocated 5% of the affected turnover as the base amount, which amounts to R137 753.72 (step two). The base amount (R137 753.72) is multiplied by 15, being the number of years of the contravention (step 3), which is R2 066 305.80. Louw's Centre's annual turnover for the financial year 2014 was R12 386 875.00, of which 10% is R1 238 687.50. The figure arrived at in step 3 (R2 066 305.80) exceeds 10% of Louw's Centre's annual turnover in 2014. This figure is therefore substituted with the annual turnover figure which is R1 238 687.50 (step 4). Given the mitigating factors discussed above, we have given a 90% discount on the amount arrived at in step 4, which gives a figure of R123 868.75 (step 5). This amount (R123 868.75) does not exceed the statutory cap of 10% of Louw's Centre's total turnover in 2014 (step 6). The penalty amount is thus R123 868.75.

Conclusion

[23] Because the parties involved have engaged in collusion by dividing markets, remedying such conduct through the imposition of a fine may not be sufficient to return the market to a competitive state as the parties need not meet to reach agreement again. In this case, the parties have agreed to take certain positive steps to remedy the harm by undertaking to notify the customers and to insert the adverts in a local newspaper as discussed earlier. In our view, these undertakings if properly observed, further serve to mitigate the level of penalty that would otherwise be imposed. Hence we have structured the order in such a way that if the respondents comply with these obligations, 50% of

the penalty will be expunged. If they fail to comply the full penalty will become payable subject to the non-compliance process that is detailed in the order.

[24] Lastly, we take this opportunity to extend our gratitude to ENS for assisting the respondents at such short notice and being the Tribunal's *amicus curiae*.

ORDER

1. Welkom Centre and Louw's Centre must advertise their respective businesses in the classified section of the Volksblad newspaper that circulates in the Orange Free State and Northern Cape regions, for a period of six months on a weekly basis. The advertisements must indicate that Welkom Centre and Louw's Centre are open to compete for business in either of these regions.

2. Welkom Centre and Louw's Centre are each to provide copies of the relevant advertisements to the Commission on a monthly basis, within seven days of the date of the advertisement. This obligation is to commence 30 days after the date of this order.

3. Welkom Centre is hereby ordered to pay an administrative penalty in the amount of **R 41 127.40 (forty one thousand, one hundred and twenty seven rand and forty cents)**. 50% of this amount is payable within 60 days of the date of this order. If Welkom Centre complies with the obligations in paragraphs one and two of this order, the balance of the administrative penalty shall be expunged. For the avoidance of doubt, a 50% discount on the administrative penalty of **R41 127.40 (forty one thousand, one hundred and twenty seven rands and forty cents)** will be granted to Welkom Centre on compliance with its obligations in this order.

4. Should Welkom Centre fail to meet the obligations in paragraphs one and two of this order, the Commission will be entitled to apply to the Tribunal for an order that Welkom Centre is in breach of its obligations, and directing Welkom Centre to pay the balance of the administrative penalty within a time period deemed appropriate by the Tribunal. The Commission shall serve its application in terms of this paragraph on Welkom Centre in accordance with the Tribunal rules.

5. Louw's Centre is hereby ordered to pay an administrative penalty in the amount of **R 123 868.75 (one hundred and twenty three thousand eight**

hundred and sixty eight rand and seventy five cents). 50% of this amount is payable within 60 days of the date of this order. If Louw's Centre complies with the obligations in paragraphs one and two of this order, the balance of the administrative penalty shall be expunged. For the avoidance of doubt, a 50% discount on the administrative penalty of **R 123 868.75 (one hundred and twenty three thousand eight hundred and sixty eight rand and seventy five cents)** will be granted to Louw's Centre on compliance with its obligations in this order.

6. Should Louw's Centre fail to meet the obligations in paragraphs one and two of this order, the Commission will be entitled to apply to the Tribunal for an order that Louw's Centre is in breach of its obligations, and directing Louw's Centre to pay the balance of the administrative penalty within a time period deemed appropriate by the Tribunal. The Commission shall serve its application in terms of this paragraph on Louw's Centre in accordance with the Tribunal rules.

7. The Commission is to inform all the customers of Welkom Centre listed in "Annexure A" of Welkom Centre's submissions dated 26 June 2015, that Welkom Centre has been found to have contravened section 4(1)(b)(ii) of the Act by dividing certain territories in the Free State and Northern Cape markets between itself and Louw's Centre for the supply and distribution of security cylinders, matching keys, padlocks, electronic and multipoint locks. Further, the Commission is to inform Welkom Centre's customers that Welkom Centre has been ordered to advertise its services in territories previously allocated to Louw's Centre.

8. The Commission is to inform all the customers of Louw's Centre listed in "Annexure B" of Louw's Centre's submissions dated 02 July 2015, that Louw's Centre has been found to have contravened section 4(1)(b)(ii) of the Act by dividing certain territories in the Free State and Northern Cape markets between itself and Welkom Centre for the supply and distribution of security cylinders, matching keys, padlocks, electronic and multipoint locks. Further, the Commission is to inform Louw's Centre's customers that Louw's Centre

has been ordered to advertise its services in territories previously allocated to Welkom Centre.

23 July 2015

Ms Mondo Mazwai **DATE**

Mr Norman Manoim and Prof. Imraan Valodia concurring

Tribunal Researcher:	Ms Caroline Sserufusa
For the Applicant:	Ms Temosho Sekgobela and Mr Jabulani Ngobeni
of the Commission	
For the Third Respondent: Nathan Sonnenbergs Inc.	Mr Mark Garden and Mr Kevin Minofu of Edward (*amicus curiae*)