COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 019984

In the matter between:

INVENSYS PLC	**First Applicant**
INVENSYS SYTEMS (UK) LIMITED	**Second Applicant**
EUROTHERM LIMITED	**Third Applicant**
and	
PROTEA AUTOMATION SOLUTIONS (PTY) LIMITED	**Respondent**

In re

The Complaint referral between:

PROTEA AUTOMATION SOLUTIONS (PTY) LIMITED	Applicant
and	
INVENSYS PLC	First Respondent
INVENSYS SYTEMS (UK) LIMITED	Second Respondent
EUROTHERM LIMITED	Third Respondent
EOH HOLDINGS LIMITED	Fourth Respondent
EOH MTHOMBO (PTY) LIMITED	Fifth Respondent

Panel : Yasmin Carrim (Presiding Member)

Andiswa Ndoni (Tribunal Member)

Fiona Tregenna (Tribunal Member)

Heard on : 12 February 2015

Order issued on : 12 March 2015

Reasons issued on : 12 March 2015

Decision and Order: Dismissal Application

Introduction

[1] On 12 February 2015 the Competition Tribunal ("Tribunal") heard a dismissal application brought by the First to Third applicants in relation to the complaint referral and interim relief application brought by the Respondent, Protea Automation Solutions (Pty) Ltd ("Protea").[1]

Background

[2] For ease of convenience the Applicants are referred to as "Invensys" or "Invensys Group" and the Respondent as "Protea". The matter between the parties has a long and convoluted history. For the sake of brevity we deal only with the salient facts relevant for purposes of this application.

[3] Subsequent to the issuance of a certificate of non-referral by the Competition Commission ("the Commission") on 20 March 2013, Protea referred its complaint ("the referral") to the Tribunal in terms of s51(1) of the Competition Act 89 of 1998 ("the Act").[2] In its referral Protea alleges that the Invensys Group and the Fourth to Fifth Respondents ("EOH Holdings and EOH Mthombo") contravened various provisions of the Act namely sections 4, 5(1), 8(a), 8(c), 8(d)(i), 8(d)(ii), 8(d)(iii), 8(d)(v) and 9(1).

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[1] The matter was referred to the Tribunal on 24 April 2013 in terms of section 51(1) of the Competition Act, 1998.

[2] Protea lodged the complaint with the Competition Commission on 12 September 2012.

[4] The Invensys Group of companies is responsible for the management of sales and distribution of components used in industrial automation and control systems worldwide which componentry is produced by entities within the Invensys Group. Eurotherm Limited ("Eurotherm"), which also falls within the Invensys Group of companies, manufactures control and automation componentry branded under the Eurotherm brand. These automation systems are utilised in the provision of industrial solutions and distributed internationally.

[5] Protea is part of the Protea Group of companies which markets, installs and maintains certain equipment in the oil and gas, pharmaceutical, food and beverage, and power utility sectors throughout Sub-Saharan Africa. The Protea Group is also an electronic communications solutions provider, focusing on broadcast, multimedia, communications and measurement solutions for the telecommunications, military and regulatory sectors.

[6] From 1947 until very recently, Protea was the sole supplier of Eurotherm and Foxboro products in South Africa. Its business, conducted under an exclusive distribution arrangement with Invensys, included the marketing, selling, distribution, installation, maintenance and upgrading of these products for end-users as well as providing related technical support services. While the arrangement persisted over a long period of time the agreement itself was not an evergreen contract but was renewed periodically.[3]

[7] During 2010, Invensys notified Protea that it intended to re-arrange its business model and would terminate its exclusive distribution agreement and that it sought to increase its footprint in the region through a number of partners. This process involved engagement between Invensys and Protea, on the one hand and Invensys and

[3] See pages 14-15 of Protea's founding affidavit to the main complaint referral.

EOH Mthombo.[4] The objective of this engagement was for Invensys to find the appropriate partner for its future business strategy for South Africa and neighbouring countries. Both EOH Mthombo and Protea were invited to make presentations to Invensys on their future growth strategy for the Invensys products in the region. Invensys ultimately concluded an exclusive agreement with EOH Mthombo. EOH Mthombo is the current sole and exclusive distributor of Foxboro and Eurotherm products and services in South Africa. However, Invensys seeks to retain certain customers in South Africa exclusively for itself by virtue of clause 5.4 of the distribution agreement concluded between Invensys and EOH Mthombo (herein referred to as the "representation agreement"). Protea, who still provides support services to the customers it has serviced to date, is now only able to access Foxboro and Eurotherm products from EOH Mthombo and cannot do so directly from Invensys.

[8] This re-arrangement by Invensys sparked a flurry of legal actions on the part of Protea, one of which was the lodging of a complaint to the Competition Commission, and subsequently, a referral under s51(1) to the Tribunal.[5]

[9] The gravamen of Protea's referral is that these arrangements, as between Invensys and EOH Mthombo, on the one hand, and between EOH Mthombo and itself, on the other, has an on-going effect of substantially preventing or lessening competition by contravening sections 4, 5(1), 8(a), 8(c), 8(d)(i), 8(d)(ii), 8(d)(iii), 8(d)(v) and 9(1) of the Competition Act.

[4] EOH Holdings Limited and EOH Mthombo (Pty) Limited form part of the EOH group of companies. Although EOH are respondents in the main matter, they were not parties to the current exception application that was brought before the Tribunal

[5] Legal action is still pending between the parties in the High Court.

Dismissal Application

[10] This application emanates from a supplementary affidavit filed by Protea, after the Tribunal directed it to amend its complaint referral by way of a supplementary affidavit. The direction by the Tribunal was at the instance of an exception application brought by Invensys in 2014. In that application Invensys had sought dismissal of the referral as a remedy on the basis that Protea's case in its founding affidavit was vague and embarrassing despite the fact that it had had ample opportunity to clarify over the last few years. After hearing the exception the Tribunal upheld the application but granted Protea an opportunity to clarify its case by the filing of a supplementary affidavit.[6]

[11] Protea was required to file its supplementary affidavit within ten business days of the date of the Tribunal order. Protea failed to comply with this and only filed its supplementary affidavit thirty three days later.

[12] The Applicants filed this dismissal application on the basis that the supplementary affidavit (SA) filed by Protea, failed to comply with the Tribunal's direction and that the Tribunal lacked jurisdiction in respect of Protea's complaint now being brought under s4(1)(b)(ii), because the conduct upon which Protea now relied upon for its 4(1)(b)(ii) case had not been filed with the Commission first as was required under the Competition Act.

Failure to comply with Tribunal order

[13] In our order dated 13 August 2014 (the "exception order"), which is attached hereto, we ordered that –

[6] See the Order dated 13 August 2014.

"The *Supplementary Founding Affidavit must set out clear and concise statements of the material facts upon which Protea relies for its claims with sufficient particularity to enable the other parties to reply thereto"* [7]

[14] The Tribunal went further and provided detailed guidance on the kind of information it required from Protea so as to render its pleadings adequate and accordingly clarify the case it sought to bring. In paragraphs 4.2 – 4.4 inclusive, the Tribunal required Protea to provide without limitation –

a. *"in respect of section 4 of the Competition Act 89 of 1998 ("the Act"), to provide material facts pertaining to the nature of the alleged horizontal relationship between Invensys and EOH Mthombo (Pty) Ltd ("EOH"); the manner in which section 4 has been contravened; the relevant product market in which this contravention took place; and the manner and extent that this alleged contravention has on competition in any relevant market or markets;*

b. *in respect of section 5 of the Act, the nature of the alleged vertical relationship between Invensys and EOH; the manner in which section 5 the Act has been contravened by this relationship; the relevant product market in which this contravention has taken place; and the manner and extent the contravention has affected competition in any relevant market or markets; and*

c. *in respect of section 8 and 9 of the Act, the relevant product and geographic market or markets in which it is alleged that Invensys is dominant; the basis of competition in those product and geographic markets; the basis upon which the alleged dominance of Invensys is computed; Invensys' and its competitors' relative market share; the manner in which Invensys is alleged to have exercised its market power; the manner in which Invensys has contravened sections 8 and 9 of the Act; and the manner and extent that these contraventions have affected competition in any relevant market or markets."*

[15] In its answering affidavit to this dismissal application Protea expressly withdrew its complaint in respect of sections 8(a), 8d(ii) and 9 of the

[7] See Paragraph 3 of the Tribunal's Order dated 13 August 2014.

Act. While this withdrawal certainly contributes to some clarification of Protea's case, the tendering of this withdrawal more than three years later and after lodging a number of complaints to the Commission, referrals to this Tribunal and interim relief applications *and* after it had been afforded a further opportunity by this Tribunal in the exception order suggests that Protea has not adequately applied itself to clarifying the case it wishes to advance. This is further borne out by the remainder of the SA, which in our view fails to comply with the exception order. (We accept that Protea has made out a case for joinder of Invensys PLC)

Section 4 case

[16] In paragraphs 20.2 of the SA the conduct now being relied upon by Protea for contraventions of section 4(1)(b)(ii), 5(1) and section 8(d)(i) of the Act[8] appears not to have been the subject of the complaint lodged with the Commission. In its complaint lodged with the Commission, Protea alleged that the Representation Agreement between Invensys and EOH Mthombo contravened sections 4(1)(a), 4(1)(b), 5(1), 8(a), 8(c), 8(d)(i), (ii), (iii), and (v) and 9(1) of the Act. In the SA Protea now alleges that a "Customer-First Agreement (CFA) between EOH and Invensys and/or Invensys UK in terms of which Invensys plc and/or Invensys UK is/are to provide MEPs to end users constitutes a market allocation within the territory in contravention of section 4(1)(b)(ii)". The terms of this agreement as alleged by Protea to be in contravention of the Act had not been previously raised with the Commission nor was it raised in Protea's referral to this Tribunal. In *Glaxo*[9] the CAC held that a referral by a private complainant may not include claims about anti-competitive conduct that had not been previously lodged with the Commission. The CAC made it clear that the Act required that the complaint referred to the Tribunal must be "substantially the same"[10] as the conduct complained of with the

[8] Subsequently withdrawn
[9] Glaxo Wellcome v National Association of Pharmaceutical Wholesalers 15/CAC/Feb02.
[10] Ibid at paragraph 33.

Commission. In other words a complainant must first lodge a complaint with the Commission and may only refer *substantially the same* complaint under section 51(1) after the Commission has been afforded an opportunity to investigate the conduct alleged to be a contravention of the Act and only after it has issued a certificate of non-referral. A complainant is not permitted to keep a part of the complaint in its pocket.[11] The *terms* of the CFA which are the subject of Protea's complaint, were never referred to the Commission by Protea and have not been the subject of investigation by the Commission. Protea argued that a reference to a Customer-First agreement could be found in the Representation Agreement that had been the subject of the Commission's investigation. However a passing reference in the Representation Agreement does not equate to a complaint by a complainant of the *conduct* as articulated in the terms of an agreement. It is clear from the SA that the terms of the Customer First Agreement are somewhat different to those of the Representation Agreement. The terms of the CFA have not yet been referred to the Commission by Protea in either of its complaints to the Commission. It is also apparent from the reasons for non-referral given by the Commission in both complaints that the terms of this agreement were not investigated by it. Accordingly the Tribunal has no jurisdiction to consider the Protea's case under sections 4(1)(b)(ii), 5(1) and 8(d)(ii) based on the terms of the CFA.

[17] The SA provides no details as required by our order in respect of the alleged contraventions of section 4(1)(a), 4(1)(b)(i) or 4(1)(b)(iii). In other words the sum total of Protea's case under section 4 now relies upon conduct that had not been previously referred to the Commission and in respect of which the Tribunal lacks jurisdiction.

[11] Supra at footnote 9, paragraph 38.

The case under section 5(1)

[18] Protea has consistently alleged that the vertical arrangement between Invensys and EOH is in contravention of section 5(1) of the Act and that Protea has been excluded from "the market". In our exception order we required Protea to clearly set out its case by providing details of "the *nature of the alleged vertical relationship between Invensys and EOH; the manner in which section 5 the Act has been contravened by this relationship; the relevant product market in which this contravention has taken place; and the manner and extent the contravention has affected competition in any relevant market or markets".*

[19] What we find instead, by reading through the SA, is a number of possible markets, without any clarity as to which of these are relevant for purposes of its section 5(1) case. For example there is seemingly the broad market for the supply of *all* Invensys products, including the Foxboro I/A series products and services,[12] then a market for only the supply of Foxboro I/A series products,[13] a market for the supply of MEPs which are a bundle of services provided to customers under the Customer First agreements ,[14] then a possible market for the supply of technical support services,[15] possible markets consisting of a combination of any of the above[16] and then a downstream "resellers" market for resale of Invensys products including the Foxboro I/A series products.[17]

[20] The geographic market is as described in paragraph 13 of the SA "*the Territory, which comprises in the Republic of South Africa, Lesotho, Swaziland, Botswana, Namibia, Zimbabwe, Malawi, Mozambique and Mauritius*".

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[12] See paragraph 12.3 and 13 of the supplementary founding affidavit.
[13] See paragraph 15 of the supplementary founding affidavit.
[14] See paragraph 29 and 37.1 of the supplementary founding affidavit.
[15] See paragraph 12.3.2 of the supplementary founding affidavit.
[16] See paragraph 12.1.2 and 12.5 of the supplementary founding affidavit.
[17] See paragraph 25 and 33.1 of the supplementary founding affidavit.

[21] As far as the manner in which it has been excluded and in which relevant market, the SA provides scant detail. Instead we see again a broad formulation in paragraph 33 that the agreements referred to in paragraph 27 "*have had the effect of eliminating competition in the relevant market*". And further in paragraph 34 "*PAS has accordingly been excluded from the relevant market*".

[22] Apart from the fact that a reasonable reading of the SA does not help us to identify "the relevant market(s)" in which the contravention has taken place and the manner and extent the contravention has affected competition in those markets, the reference to the agreements in paragraph 27 now includes an *additional* agreement, namely the Customer First Agreement the terms of which we have earlier pointed out was never the subject of a complaint lodged with the Commission.

The case under sections 8(d)(iii) and 8(c)

[23] Under section 8 the exception order required Protea to provide details about *inter alia*- "*the markets in which it is alleged that Invensys is dominant; the basis of competition in those product and geographic markets; the basis upon which the alleged dominance of Invensys is computed; Invensys' and its competitors' relative market share; the manner in which Invensys is alleged to have exercised its market power*".

[24] As indicated earlier Protea, in response to the dismissal application expressly abandoned its case under section 8(a), section 8(d)(ii) and section 9 of the Act. Seemingly it still persisted with a case under section 8(d)(iii) and 8(c) as stated in its Notice of Motion in the complaint referral. However the SA itself makes out no case under section 8(d)(iii) whatsoever. No details are given about how 8(d)(iii) which deals with tying and bundling, applies to any arrangement

between Invensys and EOH and/or Protea. In any event Protea's case under sections 8(d)(iii) or 8(c) would suffer from the same deficiencies identified previously in its complaint referral which deficiencies the SA was meant to address. In paragraph 35 of the SA under the heading "Contraventions of section 8 and 9 of the Act", the previous paragraphs 13 to 34 are repeated. These paragraphs as discussed above, raise the prospect of several possible relevant markets, include conduct that had not been previously referred to the Commission (the terms of the Customer First Agreement) and do not assist in identifying in which relevant market (s) competition has been harmed and the extent to which Protea has been excluded. As it stands, a reasonable reader of the supplementary affidavit would be none the wiser about the relevant market in which Invensys or EOH are dominant, the basis of the computation of market shares in these markets and the manner in which market power was abused.

[25] Protea argued that the SA must be read together with the founding affidavit. However this is what was sought to be avoided by the exception order. Moreover by referring back to the founding affidavit for clarification of the SA simply begs the question. Protea was afforded an opportunity to file a supplementary affidavit in order to clarify a case precisely because its case as contained in its founding affidavit of the complaint referral was vague and incoherent. It does not help to require the respondents (in the main matter) or the Tribunal to now refer to a vague prior document in order to understand a subsequent document which was meant precisely to clarify the first.

Conclusion

[26] In conclusion we find that the supplementary affidavit does not adequately clarify or make any more coherent the case that Protea wishes to advance against Invensys and EOH Mthombo. What is apparent from a reading of the supplementary affidavit, read in context

of the history of the matter, is that there are some grievances on the part of Protea from losing what was until now an exclusive arrangement between it and Invensys, but there is still a great degree of un-clarity about the possible relevant markets in which either Invensys or EOH Mthombo is dominant or in which Protea has been excluded for purposes of competition law, the nature and manner of that exclusion and about the horizontal arrangements that constitute a contravention of section 4 of the Competition Act.

[27] Protea argued that it ought to be granted a further opportunity to clarify its case. But this was precisely what it was required to do in its supplementary affidavit.

[28] In any event Protea has had a number of opportunities to clarify its competition law case through the multitude of applications it has initiated in this forum since 2011. It first lodged a complaint with the Commission in April 2011 and an Interim Relief application with this Tribunal in April 2011 (IR1). After receiving the certificate of non-referral from the Commission which clearly sets out the reasons why the Commission concluded that there was no harm to competition, Protea lodged a complaint referral under s51(1) with the Tribunal (CR1). Thereafter it withdrew both the IR1 and the CR1 without a tender of costs.[18] Thereafter, Protea lodged another complaint with the Commission which again was non-referred together with reasons therefor by the Commission. Protea then with the benefit of the Commission's assessments of its complaints lodged another complaint referral under s51(1) (the current referral) and still yet another interim relief application (IR2). The respondents in the withdrawn applications were put to great effort and cost and were, ultimately after incurring yet more costs of an application, granted their

[18] It had done so without a tender of costs which were then pursued in cases number 015297.

wasted costs by this Tribunal.[19] Notably Protea has not, as at the time of the hearing of this matter, taken any further steps in the IR2 application, which presumably was brought by it because of some urgency, and that application still stands.[20]

[29] It also took the unusual step of filing an exception to EOH Holdings Limited and EOH Mthombo (Pty) Limited's answering affidavit in the main complaint referral (Fourth and Fifth Respondents in the main complaint referral).

[30] Throughout this process Protea was at all times assisted by legal representatives.

[31] Protea was granted yet a further opportunity to clarify its case by this Tribunal in the exception application and it has failed to do so.

[32] In light of all of the above, fairness dictates that Protea not be granted yet another opportunity to clarify its anti-trust case. To grant it a further opportunity to once again file additional papers would only contribute to a further protraction of these proceedings, which have already been protracted by Protea's own conduct, and would not be in the interests of any of the parties or the public interest.

Order

[33] Accordingly we make the following order –

a. The application under case number 016584 (the complaint referral) is hereby dismissed.
b. Protea is to pay the costs of Invensys in the dismissal application under case number 019984.

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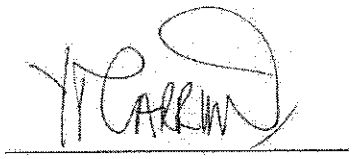
[19] See *Invensys PLC & Others vs. Protea Technology (Pty) Ltd & Others, Case no: 015297; EOH Holdings Limited & Others vs. Protea Automation Solutions (Pty) Ltd, Case no: 018275.*

[20] Invensys had also asked for the dismissal of this application. However at the hearing both parties were of the view that this might be better dealt with by a Notice of Withdrawal with a tender of costs.



12 March 2015

Ms YASMIN CARRIM **Date**

Ms Andiswa Ndoni and Prof. Fiona Tregenna concurring.

Tribunal Researcher: Caroline Sserufusa

For the 1st -3rd Applicants: Adv A Gotz instructed by Assheton-Smith Incorporated

For the Respondent: Adv MJ Engelbrecht instructed by Duncan Okes Inc

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 019315

In the matter between:

INVENSYS PLC	**First Applicant**
INVENSYS SYTEMS (UK) LIMITED	**Second Applicant**
EUROTHERM LIMITED	**Third Applicant**
and	
PROTEA AUTOMATION SOLUTIONS (PTY) LIMITED	**Respondent**

In re

The Complaint referral between:

PROTEA AUTOMATION SOLUTIONS (PTY) LIMITED	Applicant
and	
INVENSYS PLC	First Respondent
INVENSYS SYTEMS (UK) LIMITED	Second Respondent
EUROTHERM LIMITED	Third Respondent
EOH HOLDINGS LIMITED	Fourth Respondent
EOH MTHOMBO (PTY) LIMITED	Fifth Respondent

Panel	:	Yasmin Carrim (Presiding Member)
		Anton Roskam (Tribunal Member)
		Fiona Tregenna (Tribunal Member)
Heard on	:	05 August 2014
Order issued on	:	13 August 2014

ORDER: EXCEPTION APPLICATION

Having heard the parties in the above matter, the Competition Tribunal makes the orders set out below. For ease of convenience the Applicants are referred to as "Invensys" and the Respondent as "Protea".

1. Those points *in limine* brought by Invensys in paragraph 46 of its answering affidavit (which are in the nature of exceptions to the pleadings of Protea) are upheld.

2. Protea must amend its complaint referral under case number 016584, by filing a Supplementary Founding Affidavit within 10 business days of the date of this order.

3. The Supplementary Founding Affidavit must set out clear and concise statements of the material facts upon which Protea relies for its claims with sufficient particularity to enable the other parties to reply thereto;

4. Without limiting the generality of paragraph 3 the Supplementary Founding Affidavit must set out the following:

    4.1. the basis for the joinder of Invensys PLC as a Respondent to the main matter;

    4.2. in respect of section 4 of the Competition Act 89 of 1998 ("the Act"):

        4.2.1. the nature of the alleged horizontal relationship between Invensys and EOH Mthombo (Pty) Ltd ("EOH");

        4.2.2. the manner in which section 4 has been contravened;

4.2.3. the relevant product market in which this contravention took place;

4.2.4. the manner and extent that this alleged contravention has on competition in any relevant market or markets;

4.3. in respect of section 5 of the Act:

4.3.1. the nature of the alleged vertical relationship between Invensys and EOH;

4.3.2. the manner in which section 5 the Act has been contravened by this relationship;

4.3.3. the relevant product market in which this contravention has taken place; and

4.3.4. the manner and extent the contravention has affected competition in any relevant market or markets; and

4.4. in respect of section 8 and 9 of the Act:

4.4.1. the relevant product and geographic market or markets in which it is alleged that Invensys is dominant;

4.4.2. the basis of competition in those product and geographic markets;

4.4.3. the basis upon which the alleged dominance of Invensys is computed;

4.4.4. Invensys' and its competitors' relative market share;

4.4.5. the manner in which Invensys is alleged to have exercised its market power;

4.4.6. the manner in which Invensys has contravened sections 8 and 9 of the Act; and

4.4.7. the manner and extent that these contraventions have affected competition in any relevant market or markets.

5. Invensys and any other respondent must file its Supplementary Answering Affidavit, if any, within 10 business days of Protea having filed its Supplementary Founding Affidavit.

6. Protea must file its Supplementary Replying Affidavit, if any, within five business days of receiving any Supplementary Answering Affidavit.

7. Protea must pay Invensys's costs in respect of the points in limine, such costs to include the cost of one counsel.

13 August 2014

Ms YASMIN CARRIM **Date**

Mr Anton Roskam and Prof. Fiona Tregenna concurring.

Tribunal Researcher:	Caroline Sserufusa
For the 1st -3rd Applicants:	Adv A Gotz instructed by Craig Smith Incorporated
For the Respondent:	Adv MJ Engelbrecht instructed by Duncan Okes Inc