



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR213Mar14/Exc250Oct15

In the Exception applications between:

FOODCORP (PTY) LTD T/A MARPRO

Applicant

and

THE COMPETITION COMMISSION

Respondent

In Re:

The Complaint referral between:

THE COMPETITION COMMISSION

Applicant

and

GANSBAAI MARINE (PTY) LTD

First Respondent

SALDANHA FOODS (PTY) LTD

Second Respondent

FOODCORP (PTY) LTD T/A MARPRO

Third Respondent

SOUTH AFRICAN PELAGIC FISH PROCESSORS

ASSOCIATION ("SAPFPA")

Fourth Respondent

PREMIER FISHING SA (PTY) LTD

Fifth Respondent

OCEANA GROUP LIMITED

Sixth Respondent

PIONEER FISHING (PTY) LTD

Seventh Respondent

Panel	: Norman Manoim (Presiding Member)
	: Yasmin Carrim (Tribunal Member)
	: Mondo Mazwai (Tribunal Member)

Heard on	: 31 October 2016
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Reasons Issued on	: 12 December 2016
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Reasons For Decision

Introduction

- [1] This exception application was brought on 31 October 2016 against the Competition Commission ("**Commission**") by the third respondent, Foodcorp (Pty) Ltd t/a Marpro ("**Foodcorp**"), pertaining to a complaint referral currently pending before the Competition Tribunal ("**the Tribunal**").¹ The referral relates to alleged anti-competitive practices conducted by the seven respondents in the pelagic fish market. In relation to Foodcorp the Commission alleges that it together with Premier Fishing SA (Pty) Ltd ("**Premier**"), Oceana Group Limited ("**Oceana**"), and Pioneer Fishing (Pty) Ltd ("**Pioneer**") contravened section 4(1)(b)(i) ("**the Canned Fish Contravention**").
- [2] The crux of the exception raised by Foodcorp is that the Commission's referral against Foodcorp in relation to canned pelagic fish lacks the necessary averments to sustain its complaint in terms of Tribunal Rule 15(2) and that it is vague and embarrassing.
- [3] In its papers, Foodcorp sought the dismissal of the referral alternatively that the abovementioned paragraphs be struck-out from the Commission's complaint referral.² However at the hearing, Foodcorp confirmed that it would not pursue a dismissal of the referral but instead asked that the Commission be ordered to amend their complaint referral through the filing of a supplementary affidavit.

Background

- [4] On 8 July 2008, the Commission initiated a complaint against four fish processors Oceana, Foodcorp, Premier and Gansbaai Marine (Pty) Ltd and two industry associations South African Pelagic Fish Industry Association ("**SAPFIA**") and South African Pelagic Fish Processors Association ("**SAPFPA**"). This complaint was later expanded in January 2010 and 12 March 2012. The investigation culminated in the referral of the complaint to the Tribunal on 31 March 2014.
- [5] At the time of writing, Saldanha Foods (Pty) Ltd, SAPFPA and Premier had concluded settlement agreements with the Commission.³ The Commission's case against the other respondents is still pending.

¹ Case no CR123Mar14.

² We note that the heads of argument additionally requested the striking out of paragraphs 26.2 which was not contained in the respondents founding affidavit in their exception application.

³ CR213Mar14/SA106Oct14; CR213Mar14/SA066Jul16 and CR213Mar14/CO015May14 respectively.

[6] The core of the complaint against Foodcorp is to be found in paragraphs 26.2 and 42 to 46 of the referral in which it is alleged that Foodcorp and Pioneer, who had concluded an agreement for the supply of canned pelagic fish between them, contravened section 4(1)(b)(i).

[7] Paragraph 26.2 of the complaint referral provides that –

From about 2000 to 2009 Oceana, Premier, Foodcorp, Pioneer, being firms in a horizontal relationship, entered into agreements, alternatively engaged in a concerted practice, to indirectly fix the selling price of canned pelagic fish to retailers and wholesalers in contravention of section 4(1)(b)(i) of the Act. This was done through the exchange of competitively sensitive information and through linking their respective ex-factory purchase prices to their respective list prices for the sale of canned pelagic fish to wholesalers and distributors.⁴

[8] Paragraphs 42 to 46 of the complaint referral provide –

42. This referral affidavit is concerned with the arrangement between Pioneer and Foodcorp. Pioneer and Foodcorp concluded at least 3 agreements in terms of which Pioneer was to process and sell canned pelagic fish to Foodcorp. These agreements were signed on or about 22 March 2002, on or about 27 July 2004, and on or about 31 January 2007 respectively. In the context these agreements and amendments thereto, Foodcorp was obliged to provide pricing information to Pioneer. Clause 8 of the 2002 agreement, clause 5 of the 2004 agreement, and clause 5 of the 2007 agreement all linked the purchase price that Foodcorp must pay to Pioneer to the price Foodcorp charged its customers. For instance, the 2007 agreement determined that the monthly fee payable to Pioneer is equal to a percentage of the volume weighted gross average monthly price realized by Foodcorp's distribution division. Copies of the agreements were not attached so as not to burden this document unnecessarily, but will be made available upon request, subject to any confidentiality claims that may be applicable.

43. These pricing formulae necessitated that Foodcorp provide its competitor, Pioneer Fishing, from whom it was purchasing canned fish, with competitively sensitive information relating to, inter alia, market conditions, its retail and list prices for canned products and the dates on which list and purchase price increases would become effective, and discounts.

44. Pioneer and Foodcorp also agreed to restrict output periodically so as to secure the desired downstream pricing for canned pilchards. Furthermore, Pioneer periodically put pressure on Foodcorp to increase its prices.

45. In the circumstances Pioneer and Foodcorp ceased to price their canned pelagic fish, sold to retailers and wholesalers, independently.

46. Pioneer and Foodcorp agreed, alternatively participated in a concerted practice to fix the price of canned pelagic fish sold to wholesalers and

⁴ Page 18 of the trial bundle.

*retailers between 2002 to at least 2009 in contravention of section 4(1)(b)(i) of the Act.*⁵

- [9] In response, Foodcorp brought this exception application on 15 October 2016. The Commission elected not to answer the exception but indicated its intention to oppose.

Exception Application

- [10] Mr Bhana on behalf of Foodcorp submitted that the complaint failed to properly allege certain material facts required in order to allow for Foodcorp to answer thereto. The referral was vague, in that, *inter alia*, it was not clear whether the list price for canned fish and dates and percentages of increases, constituted competitively sensitive information; whether or not the information exchange was bilateral; which prices (retail or wholesale) were alleged to have been fixed and what the effect of the apparent information exchange was on Foodcorp's price setting behavior.
- [11] Furthermore the Commission had failed to articulate in the referral how a vertical relationship between Foodcorp and Pioneer translated into a horizontal collusive arrangement. Nor had the Commission clarified whether it relies solely on the provisions of the contracts or some other additional conduct to arrive at its conclusion.
- [12] As a demonstration of the vagueness in the Commission's referral Mr Bhana pointed out that the Commission's summary of the complaint referral in their heads of argument to this exception introduced additional allegations against Foodcorp which were not alleged in the referral. For example, in the heads of argument it was suggested that the information sharing was bilateral whereas the complaint referral had suggested that it was unilateral. Furthermore, the Commission had in its heads of argument relied on an agreement which was outside of the terms of the three vertical contracts in order to prove the alleged collusive conduct which is horizontal in nature. This supported Foodcorp's claim that the Commission's referral against Foodcorp was in need of elucidation.
- [13] In addition, citing *AGS Frasers*⁶, Mr Bhana argued that an allegation that Pioneer periodically put pressure on Foodcorp to increase its prices failed to meet Tribunal Rule 15(2) as it failed to indicate what Foodcorp's response was to Pioneer's 'pressure'

⁵ Page 24 of the trial bundle.

⁶ *AGS Frasers International (Pty) Ltd v Competition Commission* case no: CR025May15.

and failed to set out the dates when Pioneer allegedly “put pressure” as well as the names of the people involved.

[14] At the end of his submission Mr Bhana handed up a document entitled Third Respondents Notes in Rebuttal (“**Rebuttal Note**”) which contained proposed amendments to the Commission’s referral. As this document had not been put up in advance of the hearing the matter was stood down to provide the Commission with an opportunity to review the contents thereof.

[15] On resumption, the Commission argued that Foodcorp had, in essence, brought an application for further particulars disguised as an exception as demonstrated by the proposed remedy in the Rebuttal Note. The Commission had already provided Foodcorp, subsequent to the filing of the complaint referral, with a large volume of correspondence in response to Foodcorp’s request for information. These documents, the Commission argued, provided Foodcorp with sufficient information to answer the complaint against it.

[16] Ms Le Roux on behalf of the Commission also argued that its complaint against Foodcorp should be read in context, which is the complaint in its entirety and not just paragraph 26.2 and 42 to 46. Doing so would enable a respondent to understand both the horizontal and vertical markets which underpin the allegations against Foodcorp. Read as a whole, sufficient material facts had been pleaded in the referral in order for Foodcorp to understand and answer the case against it.

Our Approach

[17] The Tribunal’s approach to exceptions is well established. It is trite that an amendment of the Commission’s referral in response to applications to strike out and exceptions could be an appropriate remedy in certain circumstances.⁷ Given that Foodcorp has now conceded that seeking a dismissal of the referral is inappropriate at this stage, all that we have to assess is whether or not the Commission’s case against Foodcorp is set-out with sufficient granularity to enable Foodcorp to understand and answer thereto.

⁷ See in this regard *Invensys plc and others and Protea Automation Solutions (Pty) Limited* 019315 paragraph 17, paragraph 20; See also *BMW South Africa (Pty) Ltd v Fourie Holdings* case no: DCO069Sep08/DSM014May10; *Competition Commission v South African Airways (Pty) Ltd* Case no: CR081Mar01; See also *Harms Civil Procedure in the Superior Courts* B164-B170(4).

⁷ Tribunal Rule 15.

[18] The Commission's paragraph 26.2 suggests that the four respondents, collectively and with each other, fixed their respective prices in contravention of the Act. However in paragraph 42 to 46 the allegations of price fixing pertain only to Foodcorp and Pioneer.

[19] Although the Commission did not attach copies of these contracts to the referral copies of the contracts were put up by Foodcorp as part of the exception.

[20] The "pricing formula" referred to by the Commission is contained in clause 8 of the first contract and reads as follows:

Any percentage increase in [the] list price of Glenryck⁸ tails and buffs implemented after 1 March 2002 will automatically by the same percentage, increase the price payable to Pioneer as set out in paragraph 3. The price increase to Pioneer becomes effective on the date the list price becomes effective.⁹

[21] Further, clause 5.2 of the 2004 contract provides:

The prices will change by the same percentage that the list price of Glenryck tails and buffs at which Marine [Foodcorp]¹⁰ markets same change after the effective date. At the effective date the list prices for tails and buffs are R78.72 (Seventy Eight and Seventy Two Cent) and R93.36 (Ninety Three Rand and Thirty Six Cent) respectively.¹¹

[22] The subsequent contracts amended aspects of this formula in part, but the essence of the pricing formula, namely that the price paid by Foodcorp to Pioneer would be linked to Foodcorp's list prices, remained the same throughout the duration of the contracts.¹²

[23] While the pricing formula necessitates Foodcorp providing Pioneer with its list prices it does not contain any references to information about "market conditions, and discounts".

[24] Hence it is unclear which provisions of the contracts, other than clause 8 and clause 5 referred to in paragraph 42, the Commission relies upon to come to its conclusion in

⁸ The brand owned by Pioneer at the time.

⁹ Page 41 of the trial bundle.

¹⁰ Marine is Foodcorp trading name.

¹¹ Page 59 of the trial bundle.

¹² For example the 2007 amendment just changes the price of tails to R47.50. The 2007 contract at page 81 of the bundle reads- "the monthly price of the product will be 69% of the gross monthly realisation price of Nola on standard grade tails and buffs per tray..."

paragraph 43 of the referral when it states that *"these pricing formulae necessitated that Foodcorp provide its competitor with competitively sensitive information in relation to inter alia market conditions, its retails and list prices for canned products and the dates on which lists and purchase price increases would become effective, and discounts."*¹³

[25] The uncertainty is compounded by the fact that the Commission does not elucidate how the sharing of this competitively sensitive information by Foodcorp to Pioneer, as stated in paragraph 43, translates into a price fixing arrangement in contravention of section 4(1)(b)(i) as concluded in paragraph 46. Is the reader to understand that the mere unilateral sharing of information, in a vertical arrangement between Foodcorp and Pioneer, translates into a horizontal agreement or is there some other conduct that the Commission relies upon to arrive at that conclusion.

[26] Ms Le Roux during argument attempted to explain as follows:

*Yes, there are the three contracts, but there is a horizontal agreement that has been reached through the mechanism of the information that is shared under those agreements and that is the agreement that is the target of the Commission's case.*¹⁴

[27] This explanation takes the matter no further. The Commission has already alleged that the sharing of information led to a horizontal agreement but what it has not been put forward is how this occurs. In other words, it has not clarified the conduct that takes place in the interregnum between the two alleged events, the sharing of the information and the horizontal arrangement that renders the latter a contravention of the Act. In any event, the mere fact that an explanation has to be provided tends to support Foodcorp's case that further elucidation of the Commission's case is required.

[28] Furthermore it is unclear whether the Commission relies on the three contracts to support its allegations in paragraph 44 of the referral or whether it relies on some other conduct, extraneous to the contracts, in support thereof. If it relies on some other form of agreement or concerted practice to support this allegation then this needs to be pleaded.

¹³ Page 24 of the Trial Bundle.

¹⁴ See transcript page 20.

[29] During argument, the Commission claimed that it has provided a large volume of correspondence to Foodcorp which would assist it in understanding the case. However even this early discovery, helpful as it might be, does not assist the Commission in clarifying its case. Unless such correspondence has been specifically identified to apply to a particular paragraph in the referral, and there was no suggestion that this was the case, Foodcorp could not be expected to know which of the large volume of information it must have regard to, to understand the case against it.

[30] Finally we agree with Foodcorp that it is not entirely clear which price or prices are alleged to have been fixed.

Conclusion

[31] In light of the above we find that the Commission's referral against Foodcorp requires further elucidation which would serve to the benefit of both parties – Foodcorp would be placed in a position to understand the case against it in order to answer– and the Commission would have better clarified which conduct it relies upon in support of its allegations in paragraphs 26.2 and 42 to 46.

[32] Whilst we have followed some of Foodcorp's suggestions in formulating the particularity required from the Commission we do not agree that it needs to be as extensive as suggested in the Rebuttal Note.

[33] Accordingly we make the order as set out below.

Order

1. The Commission must file a supplementary affidavit by no later than 31 January 2017 in which it provides greater detail pertaining to –

1.1. What agreements or concerted practices, other than those referred to in paragraph 42 does the Commission seek to rely on in support of its allegations in paragraphs 45 and 46. Where price fixing is alleged in any of the paragraphs, particularity is required over which prices and for what product.

1.2. In relation to the exchange of sensitive information referred to in paragraph 43 the Commission must provide the following information to the extent it is able to do so:

1.2.1. What information is alleged to be sensitive and why;

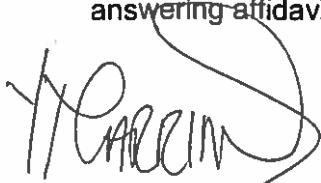
- 1.2.2. Is it alleged that the exchange of this competitively sensitive information enabled the fixing of prices and if so which prices and how;
- 1.2.3. Whether the information exchange pursuant to the pricing formulae was unilateral or bilateral between Foodcorp and Pioneer;

1.3. In relation to the allegation contained in paragraph 44:

- 1.3.1. What agreement or concerted practice gives rise to these allegations if the contracts referred to in paragraph 42 are not relied on;
- 1.3.2. What pressure did Pioneer place on Foodcorp to increase its prices and in particular when and how such pressure was brought to bear on Foodcorp, by whom from Pioneer and on whom from Foodcorp and whether or not Foodcorp succumbed to such pressure;
- 1.3.3. Furthermore elaborate over which prices, which canned products and over what period this pressure was said to apply;

1.4. Foodcorp must file its answering affidavit to the complaint referral and to the Commission's supplementary affidavit within 20 days of receiving the supplementary affidavit.

1.5. The Commission may file a reply thereto within 10 days of receiving Foodcorp's answering affidavit.



Ms Yasmin Carrim

12 December 2016
DATE

Mr Norman Manoim and Ms Mondo Mazwai concurring

Case Manager:	Aneesa Ravat
For the Applicant:	Adv Rafik Bhana SC and Adv Anthony Gotz instructed by Bowman Gilfillan
For the Respondent:	Adv Michelle Le Roux instructed by the State Attorney for the Commission