

SOUTH AFRICA / JUDGMENT

Cape Gate (Pty) Ltd v Competition Commission; In Re: Competition Commission v Arcelormittal (Pty) Ltd and Others (018259) [2014] ZACT 4 (25 July 2014)

[2014] ZACT 4

COURT

Competition Tribunal

BEFORE

Takalani Madima, Fiona Tregenna, Anton Roskam

CASE / FILE NUMBER

018259

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 018259

In the matter between:

CAPE GATE (PTY)

LTD.....Applicant

and

THE COMPETITION

COMMISSION.....Respondent

In re:

The complaint referral between:

THE COMPETITION

COMMISSION.....Applicant

ARCELOMITTAL (PTY) LTD.....First

Respondent

COLUMBUS STAINLESS (PTY) LTD.....Second

Respondent

CAPE GATE (PTY) LTD.....Third

Respondent

SCAW SOUTH AFRICA (PTY) LTD.....Fourth
Respondent

Panel: Takalani Madima (Presiding Member)

Fiona Tregenna (Tribunal Member)

Anton Roskam (Tribunal Member)

Heard on: 25 June 2014

Order issued on: 25 June 2014

Reasons issued on : 25 July 2014

Introduction

1. This is an exception application brought by Cape Gate (Pty) Ltd (“Cape Gate”) against a complaint referral lodged by the Competition Commission (the “Commission”)- In the referral the Commission alleges that Cape Gate, together with three other respondents, have contravened section 4(1)(b)(i) of the Competition Act, Act 89 of 1998, (the “Act”).
2. The application was heard on 25 June 2014 and on the same day we issued an order dismissing it. A copy of this order is annexed hereto marked A.
3. I set out below the reasons for dismissing the application.

Background

4. On 21 December 2009, the Competition Commissioner, acting in terms of section 49B(1) of the Act, initiated a complaint against four respondents, namely, ArcelorMittal (Pty) Ltd (“Mittal”), Columbus Stainless (Pty) Ltd (“Columbus”), Cape Gate and Scaw South Africa (Pty) Ltd (“Scaw”).¹
5. Subsequent to its investigation into the complaint, the Commission found that in the period commencing about 1998 to 2008, the

respondents entered into an agreement, alternatively, engaged in a concerted practice to fix the purchase price of scrap metal in South Africa in contravention of section 4(1)(b)(i) of the Act.

6. Essentially the Commission’s allegations are that the respondents, who are all manufacturers of steel products, operated as a buyer’s cartel in the market for the purchase of scrap metal.² According to the Commission, the objective of the buyer’s cartel was to standardise and coordinate the purchase of scrap metal by the respondents to ensure that they were charged similar purchase prices by scrap merchants and further that the buyer’s cartel collaborated and acted in tandem with the scrap merchants.³

7. The Commission further alleges that the respondents adopted two main interrelated mechanisms in coordinating the purchase of scrap metal from scrap merchants, namely, (i) standard pricing formula and (ii) standard premiums (discounts).
8. In relation to the standard pricing formula, the Commission alleges that in the period between 1996 and 1998 initial discussions took place between scrap consumers (the respondents), on the one hand, and scrap merchants, on the other, to develop a pricing formula for scrap metal.
9. Following these discussions, scrap merchants and scrap consumers eventually agreed jointly that the standard pricing formula would be made up of the following components: (i) a three week average of the international base price of heavy metal scrap 1 (known as “HAMS”)4, (ii) multiplied by the average rate over the corresponding period to convert the Metal Bulletin price to South African Rand (iii) less transport and FOB costs to reflect the cost of transporting scrap from the coastal ports to the inland region and (iv) less a negotiated discount.
10. According to the Commission, the standard pricing formula was renegotiated on an annual basis in two phases from around 1999 as follows. Firstly, discussions took place, one the one hand, collectively among scrap consumers only, and, on the other hand,

collectively among the scrap merchants only, in each case to formulate and agree their respective positions on the price components of the pricing formula. Secondly, the scrap merchants and the scrap consumers jointly met to negotiate and agree adjustments to

the price components making up the formula.

11. After each renegotiation of the pricing formula, the schedule setting out the revised components of the scrap formula, which yielded a revised formula price for 205 grade scrap, was circulated to the large scrap merchants and the large scrap consumers.
12. In support of the above allegations, the Commission highlighted some of the meetings and discussions that took place to renegotiate and agree on the standard pricing formula.5

13. In relation to the standard premiums (discounts), the Commission’s allegations are that the three largest scrap metal merchants, namely, The New Reclamation Group (Pty) Ltd (“Reclam”), Universal Recycling (Pty) Ltd (“Universal”) and Rand Scrap (a division of Scaw) reached an agreement with scrap consumers regarding the premiums that would be charged by the different “tiers” of scrap merchants for the sale of scrap metal. According to the Commission, the agreement was reached on the basis that the scrap consumers collectively discussed and agreed a common approach to the standard premiums and then met with scrap merchants. The Commission also attached an example of the operation of the tier system.6
14. On 07 August 2013 the Commission referred the complaint to the Tribunal for adjudication. Subsequent to the Commission’s

referral, Cape Gate filed an exception application on 02 October 2013 on the grounds that the Commission's referral is contradictory

and further lacks averments which are necessary to sustain a complaint. On 22 November 2013 the Commission filed a supplementary

affidavit in response to the exception.

Grounds for the exception

15. Cape Gate's grounds for this exception are similar to the ones that it raised in its exception filed on 02 October 2013 i.e. that

(i) the referral affidavits are vague and embarrassing and (ii) the affidavits lack averments necessary to sustain a referral.

16. In respect of the first ground Cape Gate submitted that the Commission's founding and supplementary affidavits were contradictory i.e. the allegation made by the Commission in paragraph 5 of its supplementary affidavit that "at all material times the respondents, in their capacity of consumers (therefore buyers of scrap metals, agreed to directly or indirectly fix the purchase price of scrap metal" is contradicted by the allegations made in paragraphs 32, 34, 37, 40, 52, and 61/2 of the founding affidavit and paragraphs 7,8 and 9 of the supplementary affidavit.

17. Essentially what the Commission sets out in these paragraphs is that the respondents in some instances held meetings and discussions

amongst themselves as competitors whilst in other instances the respondents held meetings and discussions together with their suppliers (the scrap merchants) wherein they collectively negotiated and had an agreement on the standard pricing formula which was used to determine the purchase price of scrap metal.

18. Cape Gate therefore alleges that it cannot determine from the Commission's papers what case to meet, specifically if the case is based on agreements allegedly concluded between scrap consumers or between scrap merchants or both.

19. Further, Cape Gate argues that the allegations by the Commission that the respondents and scrap merchants agreed jointly to the components of the pricing formula cannot be true because of the following reasons: the heavy metal scrap 1 price (HAMS) is available from the metal bulletin and is not developed by anyone, the exchange rate is determined by banks, for transport costs one would need somebody in the transport industry to find out the cost of transporting scrap metal from the coast to inland. Cape Gate further argues that even if there were discussions between the scrap merchants and the respondents regarding the formula, it does not accept that the formula could be renegotiated and that those discussions could only have been irrelevant because there could never have been any impact on the price of scrap as alleged by the Commission. In respect of discounts Cape Gate's submissions is that although it accepts that negotiations of discounts can disclose an

anticompetitive conduct, the Commission has failed to show a link between the negotiations and the price that was ultimately agreed.

20. In relation to the second ground of exception, Cape Gate's arguments is that in order for a complaint to be sustained under section 4(1)(b)(i) of the Act, it has to be alleged that an agreement or concerted practice was entered into by parties/firms in a horizontal relationship i.e. competitors and not by parties in different levels of the supply chain like the respondents/scrap

customers and scrap merchants/scrap suppliers as alleged by the Commission.

Analysis/Approach

21. In this regard I need to decide whether the Commission's case as pleaded in its founding and supplementary affidavits sets out what case Cape Gate has to meet.

22. I must say that I have not been persuaded by Cape Gate's argument on both grounds.

23. The Commission's founding affidavit clearly sets out the conduct of the respondents apart from that of the scrap merchants.⁷ Further, the Commission's supplementary affidavit gives further particulars regarding the alleged anticompetitive conduct, namely, the conduct of the respondents as consumers of scrap metal of having acted collectively instead of independently in deciding what adjustments they were prepared to pay to the scrap merchants for scrap. The Commission has in paragraph 10 of its supplementary

affidavit clearly clarified this:

"It is the Respondents' conduct of discussing and agreeing or reaching an understanding amongst themselves, and then negotiating

jointly as opposed to individually and independently with scrap merchants, on adjustments to the pricing formula and the premiums or discounts to be charged, which is the subject matter of the referral"

24. The Commission has further attached annexures which contain email discussions that took place between the respondents and the consensus that they ultimately reached.⁸ It is therefore apparent from reading both the Commission's affidavits together with the annexures that the Commission's

case had been pleaded in a manner that is sufficient for Cape Gate to be able to plead thereto. Cape Gate has simply ignored certain

paragraphs of the Commission founding and supplementary affidavits and then chose the ones that it says are contradictory. However, from a reading of both affidavits together with the annexures it is clear that there is nothing contradictory or confusing about the Commission's case against Cape Gate and the other respondents.

25. I now turn to consider the argument by Cape Gate that the referral cannot be sustained due to the requirements of section 4(1)(b)(i) as the respondents and scrap merchants are not in a horizontal relationship. This section states as follows:

- (1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if-
 - (b) it involves any of the following restrictive horizontal practices:
 - (i) directly or indirectly fixing a purchase or selling price or any other trading condition;
 - (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
 - (iii) collusive tendering.
- 26. Although this section requires that firms that are alleged to have contravened the Act must be in a horizontal relationship, I am not in a position, at the exception stage, to decide whether the Commission's case as pleaded under this section is good or bad as I need to properly understand the relationship between the respondents and scrap merchants and how the scrap price is ultimately set. Thus, this issue requires the leading of evidence and is therefore best left for trial.⁹

Conclusion

27. In the premise I make the following order:

27.1 The application is dismissed.

25 July 2014

Date

Dr. Takalani Madima

Professor Fiona Tregenna and Mr. Anton Roskam concurring

Tribunal Researcher : Ipeleng Selaledi

For Cape Gate: Adv. J Campbell SC and Adv 8 Makola

Instructed by Bowman Gilfillan

For the Commission : Adv. H Maenetje SC and Adv N Jeje

Instructed by the State Attorney

¹The Commission has indicated that it is not seeking any relief against Scaw by virtue of the fact that it

was granted conditional immunity in terms of the Commission's corporate leniency policy.

2The respondents use this scrap metal as an input in the manufacture of their respective steel products.

3According to the Commission the conduct of scrap merchants forms part of a separate referral.

4HAMS is published in the metal Bulletin (ex-Rotterdam) on a weekly basis).

5Founding affidavit, pages 24 - 26, paragraphs 52 - 59.

6Founding Affidavit, page 38.

7Paragraphs 33, 35, 36, 42, 43, 44, 60, 62, 71 and 72.

8Pages 47 - 54 of the record.

9Also see Cool heat Cycle Agencies (Pty) Ltd v the Competition Commission, Case no: 015438.

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