

SOUTH AFRICA / JUDGMENT

**Competition Commission South Africa v Pentel
South Africa (Pty) Ltd (27/CR/Apr11) [2011]
ZACT
89; [2011] 2 CPLR 352 (CT) (27 October 2011)
[2011] ZACT 89**

COURT

Competition Tribunal

BEFORE

Norman Manoim, Andiswa Ndoni, Medi Mokuena

CASE / FILE NUMBER

27/CR/Apr11

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No:27/CR/Apr11

In the matter between:

THE COMPETITION COMMISSION SAApplicant

And

PENTEL SOUTH AFRICA (PTY) LTDRespondent

Panel : Norman Manoim (Presiding Member), Andiswa Ndoni (Tribunal Member)

Medi Mokuena (Tribunal Member)

Heard on : 12 September 2011

Order issued on : 27 October 2011

Reasons

issued on : 27 October 2011

REASONS FOR DECISION - RESPONDENT'S OBJECTIONS IN LIMINE

The respondent in this case has raised certain jurisdictional issues in its answering affidavit that if decided in its favour, would end the proceedings against it. In this decision we consider whether those objections have any merit.

Issues to be decided

The respondent Pentel SA Limited (Pentel) has been charged by the Competition Commission ('Commission') for violating

section 5(2) of the Competition Act, Act no 89, 1998 (the Act).¹

In its answering affidavit Pentel contends that the claim against it has prescribed and further, alternatively that the Commissioner failed to direct an inspector to investigate the case against it as required by the Act. Pentel argues that if its propositions are correct on either of these points the case against it must be dismissed on jurisdictional grounds.

Background

Pentel supplies stationery products on behalf of its Japanese principal. Its business practice is to sell these products to other independent distributors, located throughout the country, who in turn supply retailers. One such distributor is a company named Desco Agencies CC ('Desco') based in Port Elizabeth. Certain restrictions were placed on Desco by Pentel. One of these restrictions was that as a distributor it was not allowed to charge prices below those reflected on Pentel's published price list.

In 2006, Pentel commenced selling in Port Elizabeth directly to retailers in competition with Desco. Desco alleges that it tried to get Pentel to permit it to lower its prices, to no avail. Eventually Desco filed a complaint with the Commission on 15 August 2008 alleging that Pentel had contravened section 5(2) of the Act.

On 6 March 2009 the complainant advised the Commission that it intended to withdraw the complaint. On 17 April 2009, the Commissioner initiated his own complaint against Pentel, based on the same allegations.

The statement containing this initiation states the chronology of the events:

"On 06 March 2009, the complainant (Desco) made a request for withdrawal of the complaint based on efficiency reasons and the request was noted on the Commission's meeting held on 31 March 2009. The efficiency reasons referred to by the complainant were described as the economic position that their business was operating within and much energy and effort were to be directed to measures that will help improve their business rather than focusing on the case that they might lose. It was further agreed and approved in that meeting that the Commission would continue with the investigation as if the Commissioner has initiated it. Based on the above facts, I therefore initiate an investigation into the conduct set out herein, in terms of section 49(B)(1) of the Act."

On 5 April 2011 the Commission referred the complaint to the Tribunal.

Has the complaint prescribed?

The first question we have to decide is whose complaint underpins the referral. The Act contemplates two forms of complaint initiation;

that initiated by a complainant – section 49(B)(2)(b) and that initiated by the Commission – section 49(B)(1).² In this case we have to ask what the legal effect of the subsequent initiation by the Commission was on the nature of the complaint. Put more colloquially did the complaint become that of the Commissioner or did it remain that of the complainant.

The reason this distinction matters is that complainant's complaints must be referred within one year of submission to the

Commission, unless extended by one of the means contemplated.³ It is common cause that no extension has taken place and that the Commission referred the complaint to the Tribunal more than one year after Desco had filed its complaint. Desco filed its complaint with the Commission on 15 August 2008 meaning that one year had long expired by the time the complaint had been referred.

However if the complaint on which the referral is based is that of the Commissioner, then no prescription problem arises as the Commission is not required to bring a referral in any stipulated time period where it is the initiating party.⁴

Pentel argues that the Commission did not refer a new initiation commenced by the Commissioner on 17 April 2009. It continued with the Desco complaint. Pentel relies as a factual basis for this proposition on the statement set out in the Commission's initiation statement in which it stated that "... the Commission would continue with the investigation...."

Pentel's legal proposition is based on rule 16 of the Commission Rules which provides for the withdrawal of the complaints:⁵ This Rule provides as follows:

"At anytime during an investigation, a complainant may withdraw a complaint lodged with the Commission. In such circumstances, the Commission will accept the withdrawal but may decide whether to continue investigating the Complaint as if the Commissioner had initiated it or whether the complaints withdrawal should be accepted and the matter non-referred/closed."

Pentel argues that rule 16(2) means that the Commission can take over a complaint after a complaint has been withdrawn as if it had initiated it. This means the complaint remains the complainants' complaint; it is simply taken over by the Commission and is, most significantly, subject to the prescription period provided for in section 50(2). This proposition is unsound for several reasons.

Firstly, the language of the rule is limited to the notion that the Commission may continue to investigate the complaint as if it had initiated it. Thus it means no more than that the Commission's investigation does not have to recommence from the beginning in these circumstances. If it acquired documents or information during the time it was investigating the complainant's complaint it may continue to use them. That does not make the Commission initiated complaint the complainant's complaint for the purpose of section 50. If the rule makers had intended this consequence they would have made specific reference to section 50, as they do later in dealing with Commission Rule 17, which deals with multiple complaints. Here the rule provides for the consolidation of multiple complaints if they concern the same respondents. It

states in 17(3)(c) that:

“If the Commission consolidates two or more complaints as permitted by sub-rule (2) –

....

....

After referring one of those consolidated complaints to the Competition Tribunal, or issuing a notice of non-referral in respect of it, the Commission may continue to investigate any of the remaining consolidated complaints, subject only to the time constraints set out in section 50”

Secondly, even if the rule can be given the interpretation that Pentel contends for, this would mean using the rules impermissibly to interpret the Act.⁶ The Act sets out the complaint initiation regime. Had the legislature intended that the Commission could continue with a complainant’s complaint after withdrawal, but still be subjected to the time restriction in section 50(2), it would have said so. All the various consequences of initiation are set out in detail in sections 49A, 50 and 51. If the legislature had intended this outcome it would surely have provided for it in the Act and not the rules.

Thirdly, the construction contended for is inconsistent with the logic of the Act’s complaint regime. As we explained in SAB, the time constraint imposed on the Commission when a complainant’s complaint is referred, exists to permit the complainant to refer the matter if the Commission does not do so within the stipulated time period.⁷ It protects the complainant’s right to privately prosecute if it elects to do so. Once it has withdrawn a complaint this interest ceases because there is no complainant waiting to continue the complaint if the Commission does not refer it timeously. There is thus no purpose served by Pentel’s interpretation – it is anomalous.

Conclusion on prescription objection

We therefore find that there is no provision in the Act for the Commissioner to takeover a complainant’s complaint. Once the complainant had withdrawn the complaint, it ceased to exist as a complaint in terms of section 49(B)(2)(b) of the Act. When the Commission initiated the complaint on 17 April 2009, it became a complaint in terms of section 49(B)(1), which in terms of section 50(1) could be referred at any time and was thus not subject to the one year time limitation imposed in terms of section 50(2) for the referral of complainant’s complaints, and accordingly, the complaint was referred in time. The first point in limine fails.

Appointment of inspector

In its answering affidavit Pentel made the following allegation. We quote this as the language used is confusing:

“9. In this instance however and contrary to these principles, the Commission –

9.1 Investigated the Respondent [Pentel] before initiating a complaint against the respondent;

9.2 Failed to appoint an inspector as mandated by section 49(B)(3)”

Later in the same pleading, Pentel goes on to allege that the Commissioner failed to appoint an inspector as required by law and that this resulted in the Commissioner's investigators acting ultra vires when they investigated it.⁸ By failing to make the appointment it is alleged, the Commissioner ousted the jurisdiction of the Commission.⁹

This allegation was stated baldly and no facts were alleged to back up this conclusion.

In its replying affidavit, the Commission clearly misconstrued the point and assumed that the criticism was that the persons directed

to investigate were not appointed as inspectors. The Commission alleged they were and attached their respective certificates of appointment. This is not surprising as the use of the term appointment is not found in section 49(B)(3) but in section 24 which provides for the appointment of inspectors.¹⁰ Inspectors are not 'appointed' to specific cases. They receive an appointment to the office of inspector in term of section 24 of the Act. This is a general appointment not one specific to any particular complaint investigation. Section 49(B)(3) on the other hand states:

"Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable." (Our emphasis).

Thus the allegation that Pentel appears to be making is that inspectors were not directed to investigate the complaint against them. The Commission in its replying affidavit, despite misconstruing the objection, nevertheless alleges in paragraph 8.2 that:

"The Commissioner received a complaint from Desco agencies on 15 August 2008 and on the strength of a complaint, the Commissioner assigned inspectors to investigate the complaint." (Our emphasis)

In a further supplementary affidavit Pentel repeated its allegation although now it alleged that the Commissioner "did not properly appoint an inspector as required by law."

The Commission in yet another supplementary affidavit responded to this by repeating its earlier denial.

During argument Pentel stated that the allegation that an inspector had been 'assigned' in the replying affidavit was insufficient to comply with section 49(B)(3), which required that an inspector be 'directed'. This is not the point made in the papers, where Pentel had itself been less precise in its language, referring to the 'appointment'

of an inspector, which as we have seen is the language of section 24 not section 49(B)(3) which uses the term 'direct'.

Nothing turns on the fact that the Commission used the term 'assign' as opposed to 'direct' in dealing with this allegation in its replying affidavit. Both terms presuppose an instruction from the Commissioner to an inspector to investigate a complaint.¹¹ Once the Commission has made this allegation of "assignment", in the absence of any evidence to the contrary, we may assume that an inspector has been directed to investigate the relevant complaint. There is no formality for the manner in which the inspector is directed in terms of section 49(B)(3). Thus an oral

instruction would suffice. It therefore cannot be expected that the Commission would have to furnish documentary proof of the instruction.

The onus to establish the point in limine rests with Pentel. In the face of the Commission's denial it must fail on this point too.

The second point in limine is dismissed.

ORDER

The application is dismissed.

There is no order as to costs.

27 October 2011

NORMAN MANOIM DATE

Andiswa Ndoni and Medi Mokuena concurring.

Tribunal Researcher: Thabo Ngilande

For the merging parties: Arnold Subel S. C. instructed by Fluxmans Attorneys

For the Commission: Mr Bongani Ngcobo

Mr Bukhosibakhe Majenge

Mr Tlabo Mabye

1Section 5(2) of the Act provides that: "The practice of minimum resale price maintenance is prohibited."

2Section 49B (1) of the Act stipulates that "The Commissioner may initiate a complaint against an alleged prohibited practice."

Section 49(B)(2)(b) states : "Any person may - submit a complaint against an alleged prohibited practice to the Competition

Commission in the prescribed form."

3Section 50(2) which states "Within one year after a complaint was submitted to it, the Commissioner must – Subject to subsection (3), refer the complaint to the Competition Tribunal, if it determines that a prohibited practice has been established ; or In any other case, issue a notice of non-referral to the complainant in the prescribed form."

3Section 50(2) which states "Within one year after a complaint was submitted to it, the Commissioner must –

Subject to subsection (3), refer the complaint to the Competition Tribunal, if it determines that a prohibited practice has been established ; or

In any other case, issue a notice of non-referral to the complainant in the prescribed form.”

4Section 50(1) provides that “At any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.”

5What we refer to as the Commission rules are more formally described as the “Rules for the conduct of proceedings in the Competition Commission.”

6See *Hamilton Brown v Chief Registrar of Deeds* 1968 (4) SA 735 and *Moodley and Others v Minister of Education and Culture, House of Delegates, and Another* 1989 (3) SA 221 (A)”

7*The Competition Commission v SAB* 134/CR/Dec07.

8See answering affidavit paragraph 16.

9See answering affidavit paragraph 17.

10Section 24 of the Act provides that: “(1) The Commissioner may appoint any person in the service of the Competition Commission, or any other suitable person, as an

inspector.

(2)

(3) An inspector must be provided with a certificate of appointment signed by the Commissioner stating that the person has been appointed as an inspector in terms of this Act. (4).....”

10Section 24 of the Act provides that:

“(1) The Commissioner may appoint any person in the service of the Competition Commission, or any other suitable person, as an

inspector.

(2)

(3) An inspector must be provided with a certificate of appointment signed by the Commissioner stating that the person has been appointed as an inspector in terms of this Act.

(4).....”

11The Shorter Oxford English Dictionary gives as one of the definitions of the verb ‘assign’ as “to appoint, designate, for an office, duty or fate.”. The word ‘direct’ is not defined in the Competition Act, however, according to Concise Oxford English Dictionary the word direct means inter alia “give an order to.”

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