

SOUTH AFRICA / JUDGMENT

Competition Commission v H Pistorious & Co (Pty) Ltd; In re: Competition Commission v H Pistorious & Co (Pty) Ltd and H Pistorious & Co (Pty) Ltd v Competition Commission (CR150Oct13/ASP165Dec14/Exc200Feb15) [2015] ZACT 123; [2015] 2 CPLR 729 (CT) (14 July 2015) [2015] ZACT 123

COURT

Competition Tribunal

BEFORE

Yasmin Carrim, Andreas Wessels, Medi Mokuena

CASE / FILE NUMBER

CR150Oct13/ASP165Dec14/Exc200Feb15

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR150Oct13/ASP165Dec14/EXC200Feb15

In the matter between:

The Competition Commission APPLICANT

and

H Pistorius & Co (Pty) Ltd RESPONDENT

In re:

The substitution application between:

The Competition Commission APPLICANT

H Pistorius & Co (Pty) Ltd RESPONDENT

The exception application between:

H Pistorius & Co (Pty) Ltd APPLICANT

The Competition Commission RESPONDENT

Panel

: Yasmin Carrim (Presiding Member)

: Andreas Wessels (Tribunal Member)

: Medi Mokuena (Tribunal Member)

Heard on

: 28 May 2015

Reasons

Issued on : 14 July 2015

Reasons

for Decision

Background

[1] On 20 August 2008 a complaint was filed against H. Pistorius & Co (Pty) Ltd, alternatively H. Pistorius en Kie ("H Pistorius & Co") by Mr. Du Preez of Enviro Lime to the Competition Commission (the "Commission").

The Commission, after completing its investigation, referred a complaint to the Competition Tribunal ("Tribunal") in which it alleged that H Pistorius & Co (Pty) Ltd (the "Company" or the "Respondent"), engaged in minimum resale price maintenance ("RPM") of calcitic agricultural lime ("CAL") between 2004 and 2010.

[2] In its answering affidavit, the Company raised as one of its points in limine that the complaint was brought against the wrong entity and not against the trading entity, namely the Hendrik Pistorius Trust No IT 114/63 (the "Trust"). The respondent explained that there were a number of entities in the H Pistorius stable but the trading entity at the time of the alleged contravention was the Trust and not the company.

[3] The Commission then brought an application to compel further and better discovery filed on 21 August 2014 in which it sought documents/information relating to the Trust, H Pistorius and Co, Pistorious Beleggings, and H Pistorius (Pty) Ltd. This application was opposed by the Respondent on the basis that it sought to compel discovery from entities that were not cited as respondents to the proceedings. The Commission subsequently did not pursue that application [1] and brought this application for substitution.

[4] In this application for substitution the Commission sought to substitute the Trust for H Pistorius & Co (Pty) Ltd as the respondent in the matter. Curiously, in response to the Commission's application to substitute, H Pistorius & Co (Pty) Ltd brought an exception application. The application for substitution and the exception were heard together on 28 May 2015.[2]

Non-compliance with Tribunal Rule 45(3)

[5] The substitution application was brought in terms of Tribunal Rule

45. In the course of the proceedings the Tribunal was informed that the application had not been served on the Trust or the individual Trustees, which the Commission now sought to cite as respondents, and that the Trust was not represented at the hearing.

[6] Mr. Coetzee on behalf of H Pistorius & Co (Pty) Ltd submitted that on this basis alone the Commission's application for

substitution must fail for non-compliance with the rules of the Tribunal.

[7] Since this is an application for substitution rather than joinder, Rule 45(1) has no relevance. Furthermore it was common cause between the parties that this application was not a species of the kind contemplated in Rule 45(2) which relates to the correction of a misnomer and requires the mere correction of a technical irregularity. Instead this application requires the substitution of one legal entity for another. Accordingly Rule 45(2) is also inapplicable. The relevant rule is therefore Rule 45(3).

[8] The relevant portion of Rule 45(3) requires that "[i]f in any proceedings it becomes necessary to substitute a person for an existing party, any party to those proceedings, on application and on notice to every other party (our emphasis), may apply to the Tribunal

...for an order substituting that party for an existing party ..."

[9] On an ordinary reading of the rule, it clearly contemplates that "notice" of such intention to substitute a person must be given to every other party to the proceeding. While the rule does not expressly state that "every other party" includes the person that is sought to be substituted, to argue the contrary would lead to a bizarre outcome, namely that the rule would require notice to be given to every other party to the proceeding except the person or party to be substituted!

[10] The Commission argued that the latter part of that paragraph, namely "on application and on notice to every other party ...for an order substituting that party for an existing party" did not require service of the application to substitute on the Trust or the Trustees. Mr. Ngongo on behalf of the Commission argued that the Tribunal was entitled to grant the substitution application without such application being served on the Trust or the individual trustees first, provided there was no prejudice to the party sought to be substituted that could not be cured by an order of costs. He relied on the judgment of Flemming DJP in O'Sullivan[3] in support of this stance.

[11] However, none of the cases relied upon by the Commission supported the contention that Tribunal Rule 45(3) should be interpreted in this manner. In all of these cases the issue to be decided was not whether or not service of the summons (or application) – in other words notice to the person intended to be brought to court - could be dispensed with. O'Sullivan was concerned simply with the rectification of the respondent's name from Heads Models Agency to Heads Models Agency CC. In that case the respondent was present at the proceedings and understood that the summons which had been served on it was intended for it. The case of Janet discussed therein by Flemming J - and which ostensibly was also

relied upon by the Commission - was also not concerned with whether or not notice or service of the summons on the person sought to be substituted could be dispensed with.

- [12] A cornerstone of our legal system is that a person is entitled to notice that proceedings are being instituted against him or her. In general, legal proceedings cannot commence unless the party against whom relief is sought is notified of the initiating process by means of service.[4] This principle is captured in Rule 4(1)(a)(ix) of the Uniform Rules of Court which requires service on each Trustee.[5]
- [13] The fundamental principle echoed in this practice is the notion of fairness or fair administrative justice as contemplated in the Constitution of the Republic of South Africa.[6] The interpretation sought by the Commission is not only a conflation between the standard for granting a substitution application (substantive review) with a procedural requirement (to notify) but would also be inconsistent with section 52(2) of the Competition Act that requires this Tribunal to conduct its proceedings in accordance with the principles of natural justice. [7] It would also be a violation of the Constitution. When proceedings have begun without any notice the subsequent proceedings are null and void and may be disregarded or set aside.[8]
- [14] Hence we conclude that Rule 45(3) read in context, and in accordance with the fundamental principle of fairness, requires a party wishing to join or substitute a party or a person to serve notice on that person or party. In this instance, the Commission was required to serve notice of the substitution application on individual Trustees so as to afford them an opportunity to be heard on the merits of the substitution application. Indeed even if the rules were silent on the issue of substitution or joinder, fairness would require that the application to substitute be served on the Trustees. As it stands the Commission's failure to comply with Rule 45(3) has resulted in this undesirable situation where the entity sought to be cited as respondent was not present or represented at the hearing while the entity being sought to be substituted out, the current respondent, was opposing the very application which it stood to benefit from.
- [15] The Tribunal Rules for the Conduct of Proceedings do not specifically provide for a procedure for service on a Trust. However, we are guided by Rule 4(1)(a)(ix) of the Uniform Rules of Court[9] and require the Commission, should it still persist to substitute or join the Trust, to serve the application on the individual Trustees of the Trust.

Conclusion

- [16] In light of the above, we conclude that the application to substitute is defective due to the fact that the Commission failed to serve the application on the Trustees of the Trust and is accordingly dismissed for non-compliance with Rule 45(3). In the event that the Commission still seeks to substitute or join the Trust to the proceedings it must serve such application on the individual Trustees and afford them a reasonable opportunity to answer such application as provided in the Tribunal Rules. Given that the Trust and the individual Trustees were not

afforded such opportunity and were not represented at the hearing we find that the application to substitute and consequently the application for exception are not ripe for hearing.

14 July 2015

DATE

Yasmin Carrim

Andreas Wessels and Medi Mokuena concurring

Tribunal Researcher: Aneesa Ravat

For the Applicants:

Adv. P Ngcongco instructed by The Competition Commission

For the Respondents: Adv. A Coetzee instructed by Louw Attorneys

[1] See Transcript of hearing in the Discovery Application between the Commission and H Pistorius & Co (Pty) Ltd & Three Others; Case No. 019604 on 10 October 2014.

[2] As agreed in a prehearing held on 22 April 2015.

[3] O' Sullivan v Heads Model Agency CC 1995

(4) SA 253 (W).

[4] Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the high court of South Africa

See Harms at 8-11[Issue 52].

[5] See Harms at 8-18 [Issue 51].

[6] See Bill of Rights and section 33.

[7] The law permits of ex parte applications in very few exceptional circumstances but this is not such a situation. Nor did the Commission provide an explanation as to why service on the Trustees had not been effected.

[8] See Harms at 8-11[Issue 52] and the cases cited Dada v Dada 1 971

(2) SA 287 (T); SA Instrumentation (Pty) Ltd v Smitchem (Pty) Ltd 1 977

(3) SA 703 (D); Mutebwa v Mutebwa 2001

(2) SA 193 (TK).

[9] As contemplated in Tribunal Rule 55(l)(b).

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