

SOUTH AFRICA / JUDGMENT

Competition Commission v South African Breweries Ltd and Others

(134/CR/DEC07) [2010] ZACT 65; [2010] 2 CPLR 401 (CT) (15 October 2010)

[2010] ZACT 65

COURT

Competition Tribunal

BEFORE

Norman Manoim, Yasmin Carrim, Merle Holden

CASE / FILE NUMBER

134/CR/DEC07

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BEFORE THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO: 134/CR/DEC07

In the matter between:

COMPETITION COMMISSIONApplicant

and

SOUTH AFRICAN BREWERIES LIMITED1st Respondent

AFRICA'S BEER WHOLESALERS (PTY) LTD2nd Respondent

BOLAND BEER DISTRIBUTORS (PTY) LTD3rd Respondent

ERMELO BEER WHOLESALERS (PTY) LTD4th Respondent

GREYTOWN BEER DISTRIBUTORS (PTY) LTD5th Respondent

MAKHADO BEER WHOLESALERS (PTY) LTD6th Respondent

MIDLANDS BEER DISTRIBUTORS (PTY) LTD7th Respondent

MKUZE BEER WHOLESALERS (PTY) LTD8th Respondent

SOUTHERN CAPE BEER DISTRIBUTORS (PTY) LTD9th Respondent

STEFQUO (PTY) LTD10th Respondent

VRYHEID BEER DISTRIBUTORS (PTY) LTD11th Respondent

MADADENI BEER WHOLESALERS (PTY) LTD12th Respondent

WESTONARIA BEER DISTRIBUTORS (PTY) LTD13th Respondent

THOHOYANDOU BEER DISTRIBUTORS (PTY) LTD14th Respondent

Panel : Norman Manoim (Presiding Member), Yasmin Carrim (Tribunal Member), and Merle Holden (Tribunal Member)

Heard on : 18 August 2010

Decided on : 20 August 2010

Reasons

issued on : 15 October 2010

Reasons for order requiring Metcash to produce documents

The Application

This is an interlocutory application brought by the first respondent in this matter, South African Breweries Limited ("SAB"), to require a witness for the Commission to produce documents for the purpose of cross examination.

The application was heard on 18 August 2010, and the order was given on 20 August

2010. This decision explains our reasons for giving that order.¹

The background to the case is set out in an earlier interlocutory decision and need not be repeated here.²

The witness in question is Mr Peter Dodson, the Chief Executive Officer of Metcash Trading Africa (Pty) Ltd ('Metcash'). Metcash is a firm that both distributes liquor to other licensees and sells liquor itself at large outlets known as cash and carry stores. It has a wide footprint comprising 120 cash and carry stores, 300 franchises and 37 bottle stores nationwide. Importantly it possesses a national licence to distribute liquor as well. It is thus a retailer of liquor and a wholesaler; in the latter sense because it distributes liquor to other retail outlets.

Customers either purchase liquor from Metcash at its outlets on a cash and carry basis or order liquor from it, which is then delivered to them.

Dodson submitted a witness statement to the Commission which was in terms of our directions provided to the parties prior to the commencement of the hearing.

Subsequently on 26 July 2010, before the commencement of the hearing, SAB served a subpoena duces tecum on Dodson requiring various documents from Metcash. Metcash disputed SAB's entitlement to certain of these documents and appeared on the first day of this hearing on 11 August 2010, to contest the subpoena. It was resolved that we would hear Dodson's evidence in chief and then hear argument on the subpoena. After Dodson had testified in chief on 16 August 2010, SAB's counsel indicated that as a result of his testimony they sought further documents from him; i.e. additional to the ones required of him by the subpoena.

We allowed SAB to furnish an expanded list and asked it to motivate the reasons for requiring the documents. SAB then did so on 16 August 2010. After receiving the list, Metcash filed an affidavit from its attorney in which it outlined its response to the request for the documents. We then heard argument from all parties including SAB on the matter on 18 August 2010.

On 20 August 2010 we heard further argument but solely on the question of the appropriateness of the appointment of the independent auditor.³ On the same day we issued our order.

The request for certain documents was not contested by either Metcash or the Commission and for that reason we need not discuss them in any detail in these reasons.⁴

The approach of the parties

Although SAB faces several counts in this matter – sections 4, 5(1), 5(2) and 9(1) it has confined the request for documents to meet the section 9(1) count. Section 9(1) prohibits price discrimination by a dominant firm in certain circumstances.

Essentially the Commission's case on this count is that SAB gives its appointed distributors (the 'AD's' which are the 2nd to 14th respondents in this case), a fee for distribution that is not given to other firms that distribute SAB products.

These firms, the Commission asserts perform the same function – i.e. distributing beer from SAB depots to retail customers. The Commission asserts that the distribution fee given to the AD's is a form of discount and that because it is denied to other distributors who perform the same function, it is discriminatory. In his witness statement Dodson states that Metcash competes with the AD's in several areas around the country and that notwithstanding its large distribution network his group has not received terms that reflect this scale.⁵ In particular he complains that his group has historically received no discounts for bulk purchases of beer quarts from SAB. He surmises that the AD's get a better deal because they can continuously sell at or below Metcash's cost.

SAB alleges that the payments to AD's are a fee, not a discount and that the functions the latter perform are not equivalent to those performed by non appointed distributors. Albeit they may be functionally equivalent, they are not economically equivalent. One of the requirements to prove unlawful price discrimination by a dominant firm is that the transactions compared are equivalent.⁶ By way of example, although not exhaustive of the different obligations SAB alleges that it imposes on the AD's by way of contract, but not independents, are a universal service obligation in their designated area, a requirement not to carry anyone else's products and a set of

standards for warehouse efficiencies.

SAB justified its request by arguing that in order to decide the issue of equivalence it was necessary to know what the scale of an independent distributor like Metcash was, what the effect of granting a discount would be and hence one needed to know what margins were being earned, how efficient the undertaking was and what its potential was.⁷

Metcash associated itself with much of what the Commission said on relevance but also addressed the burden on itself and the manner in which the request had been made of it.

Our approach

We refused production of the documents sought that relate to the following:

An agreement between transport and logistics company Imperial and Metcash. Imperial does some distribution for Metcash;

Metcash's asset register reflecting the vehicles and forklifts dedicated to liquor distribution;

Metcash's documents reflecting the vehicles dedicated to the delivery of alcoholic beverages excluding the Imperial vehicles and a breakdown of vehicles allocated to each store for this purpose.

Various documents requested in respect of Metcash's Ermelo store relating to:

Vehicle usage for alcoholic beverage delivery;

Volumes and revenues of SAB versus non SAB products sold at the store and the proportion delivered by that store. The same information was required in relation to Brandhouse versus SAB, specifically;

Store size and respective proportions for liquor versus non liquor and SAB versus non SAB;

Financial statements and strategic documentation concerning the Metcash business.

The documents we ordered to be produced, relate to the margins earned and volumes distributed of alcoholic beverages distributed by Metcash, in particular SAB products, specific SAB products such as quarts, and documentation that would allow for comparisons with the major rival distributor of beer, Brandhouse. We also permitted scrutiny of contracts Metcash has with Brandhouse and another major liquor company Distell, which may relate to distribution, service levels trading terms, discounts and rebates.

These documents appear to have high probative value to the issue of equivalence in order to see what terms Metcash has with major alcohol distributors whose products it also distributes and whose products it is seemingly distributing increasingly at the expense of SAB products to see if they afford relevance to the debate over equivalence and the effects of the differential treatment of AD's and independents.⁸

The same cannot be said of the other documents requested most of which were requested not at the time of the original subpoena but as a reaction to Dodson's testimony.

SAB argues that this evidence is relevant to determine the relative efficiencies of Metcash versus those of its own AD's. The Commission argues that efficiencies are not relevant to a determination of section 9

- (1) as it does not, unlike section 8, permit an efficiency defence.⁹ Counsel for the Commission argued that the issue is not about comparative efficiencies, but whether the independents can compete for the sale of SAB products with the AD's if they (the independents) are denied a discount equivalent to the distribution fee paid to the AD's, and whether this has adverse consequences for their customers and consumers. SAB's counter argument is that evidence of efficiencies was led by the Commission in the course of Dodson's evidence and that some passages in the Commission's expert report speak to the issue of efficiencies when dealing with price discrimination.

We are reluctant to determine this issue solely on relevance. We are mindful of the fact that our case law on price discrimination and particularly on what equivalence means is not well developed presently. Such a debate may be better resolved at the end of the case than in its earliest stages. To take a decision prematurely on the ambit of equivalence without the benefit of final argument and a record would be shortsighted.

We therefore have approached the issue by asking what would be the probative value of such evidence in the totality of the case and would it open up a number of collateral disputes not capable of resolution by us. We are also mindful of the fact that we need to balance SAB's need to defend itself against the rights to business privacy of Metcash which is only a witness and not a party to these proceedings.

We were not persuaded that documents relating to Metcash's distribution infrastructure would either produce meaningful information or probative information in the context of the whole case which is not limited to the AD's operations being compared to those of Metcash. Indeed as we understand the evidence Metcash is but one independent distributor albeit it may be a significant one. Thus it is hard to see how asset registers reflecting forklift use dedicated to liquor distribution, as opposed to any other usage, will answer issues in this case. It is far easier to see how this information, even if it is even collated in such an articulate fashion as to show this distinction in usage, which in itself is an assumption on which nothing we have been told is based, could lead to collateral disputes of an indeterminate nature. Was the forklift only used for non liquor purposes and could such usage be altered, how many forklifts does a branch that distributes X many cases require – how long should forklift drivers work, and so on?

Nor will an inspection of Metcash's financial statements lead to anything but disputes over their interpretation and significance – for instance the firm is a large wholesaler and retailer of many goods, not just liquor, whilst on the other hand being highly invasive of the firm's privacy.¹⁰ This information is not in the public domain as Metcash is not listed. The same can be said for requests of its strategic information. It is not clear that such documents deal with future liquor

distribution strategy or if they do so, in any manner, that will be useful to determining the issues in dispute in this case. On balance we exercise our discretion in favour of refusing to order their production.

Comparisons between Metcash's distribution outlet in Ermelo and those of its AD counterpart, also give rise to collateral issues of doubtful resolution. Indeed the case is a national one – no basis is argued as to why Ermelo should be a candidate for such microscopic examination. We are not even comparing the Ermelo AD to all other independents in its area through this exercise, only one – Metcash. It appears that the Ermelo requests arose as a response to the evidence of Dodson.¹¹ They did not figure in the original subpoena and hence could not previously been considered as an issue of importance. The information requested is thus of low probative value and is also not such as to be determinative of comparative efficiencies between the two neighbouring outlets. Nor are we clear that such a comparison itself would be highly probative.

Mode of inspection

In response to the affidavit from Metcash complaining about the burden of accumulating all the documents sought, SAB proposed that it appoint at its expense an independent auditor who would be given access to the Metcash documents and IT infrastructure to assess what documents were required. As such SAB argued the firm was spared the burden.

Metcash vigorously opposed this suggestion, saying giving a third party access to its business information was highly invasive of its business secrets. It also argued that as the person would need constant help in accessing the information, this would not in reality relieve it of the burden. Metcash tendered then to furnish any documents the Tribunal required it to produce, provided that it was compensated for the expense of copying.

SAB maintained its insistence on the appointment of an independent auditor although now it seems the purpose was for someone to reduce its burden of what documents it should view as it argued that the auditor could get a representative sample and not all the material.

We agree that appointing an auditor against the wishes of the firm concerned would be too invasive of its business and that once it tendered to supply the documents ordered that sufficed. Accordingly we did not make the appointment of an independent auditor part of our order.

In respect of certain contracts, because they involved the confidential information of other third parties who are rivals of SAB – an added layer of protection was introduced to require that these contracts be inspected at the premises of Metcash or its appointed representatives by prior arrangement and on the furnishing of appropriate confidentiality undertakings.¹²

_____ 15 October 2010

Norman Manoim Date

Concurring: Yasmin Carrim and Merle Holden

Tribunal Researcher: Londiwe Senona

For Metcash Trading Africa (Pty)Ltd : R Bhana (SC) instructed by Fluxmans Inc.

For the First Respondent : D Unterhalter (SC) instructed by Bowman

Gilfillan

For the Second to Fourteenth Respondents : J Wilson instructed by Deneys Reitz

For the Commission : A Gotz instructed by Mkhabela Huntley Adekeye Attorneys

1The order is annexed hereto marked 'A'.

2This earlier interlocutory decision relates to an order separating issues and was decided on 9 July 2010. CT Case No. 134/CR/Dec07.

3See below the section on mode of inspection where we discuss this issue further.

4These are items 2.2.1 of the subpoena, and items 4 of Annexure A of our order.

5See witness statement paragraph 2.2 2.3.

6Section 9(1)(b).

7See transcript page 588.

8However we have denied a widening of the request to non alcoholic beverages, as again this raises a collateral issue of tenuous relevance in the overall scheme of the case. The Commission's case is premised on the distribution of alcohol of which beer is the major product category. Whilst Metcash distributes other products to customers, including groceries, SAB concedes that it cannot request all this information from it, and hence, despite the fact that it may distribute other non beverage products to customers it restricts itself. However, SAB does not, despite having conceded that there must be some limitation on information provided, justify sufficiently why nonalcoholic beverages should be taken into account as well. Again this is information at best tangential to the main issues, but highly invasive of the business of a nonparty to the proceedings.

9See transcript page 560. As counsel for the Commission put it, the debate is not about whose fleet is bigger.

10The requests for the financial statements owed their genesis to an attempt to find out about margins in respect of Metcash's

sales. It was pointed out by Metcash in its affidavit that this information did not figure in its financial statements, yet SAB

persisted in requesting them and now justifies this on the basis that they go to the financial viability of Metcash. It says one of the issues is how the business will fund growth and that requires looking at their financial statements.

11The basis for claiming them is based on an assertion in Dodson's evidence that his distribution system is superior to that of an AD in the Ermelo area.

12See par 1.2 of the Tribunal's order in relation to the subpoena. Note that at least one of these firms concerned Brandhouse, which indicated in a letter attached to the Metcash affidavit, its concerns in this regard.

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Prepared on 11 October 2026 · Esheria