

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 97/CR/Sep08

BMW South Africa (Pty) Ltd

t/a BMW Motorrad

Applicant

and

Fourier Holdings (Pty) Ltd

t/a Bryanston Motocycles

Respondent

Panel : Yasmin Carrim (Presiding Member);
Medi Mokuena (Tribunal Member); and
Andreas Wessels (Tribunal Member)

Heard on : 14 October 2010

Decided on : 1 February 2011

Reasons: BMW's Dismissal Application

The Application

1. On 19 April 2010, Fourier Holdings (Pty) Ltd ("Fourier") applied for declaratory relief against BMW South Africa (Pty) Ltd ("BMW") in terms of section 58(1)(a) (v) of the Competition Act, 1998 ("the Act"). This application concerns objections brought by BMW against Fourier's application. The objection has two components. In the first instance BMW submits that it is incompetent for Fourier to seek relief against BMW in terms of sections 5(1) and 8(c) of the Act. The second objection alleges that Fourier's application is vague and embarrassing in some respects. BMW requests the Tribunal to set aside

Fourier's application for these reasons alternatively to grant an order requiring Fourier to amend its application in order to cure the defects.

2. The historical background is briefly discussed below.

History of the case

3. On 8 October 2004, Fourier submitted a complaint to the Competition Commission ("Commission") alleging anti-competitive conduct by BMW in the domestic market for the sale and distribution of BMW motorcycles and accessories; which includes for example helmets, rider gear, boots, gloves, and top boxes. After its investigation the Commission found that BMW had contravened sections 5(2), 8(c) and 5(1) of the Act.
4. The Commission referred the complaint to the Tribunal on 4 September 2008. On 11 November 2009, the Commission however unconditionally withdrew the portion of the complaints based on sections 8(c) and 5(1), which meant that the only case before the Tribunal involved a contravention of section 5(2) of the Act. The hearing of this matter was scheduled in March 2010. On 16 March 2010 the Commission and BMW submitted a settlement agreement to the Tribunal in respect of the section 5(2) case. This agreement did not provide for a penalty nor did it contain an admission of liability by BMW. It did however provide for BMW's future conduct.
5. A hearing of the settlement agreement was held on 17 March 2010. Present in the hearing was the complainant who opposed the agreement. Fourier's concern was that confirmation of the settlement agreement would compromise its rights to claim declaratory relief in terms of section 49D (4) because it was being concluded after the Commission had referred the complaint to the Tribunal.¹ In order to address this concern, BMW concluded an addendum to

¹ This concern arises from the CAC judgement in the *Glaxo* case in which the court held that in the course of its (the Commission's) case a settlement of a matter after the Commission had referred it to the Tribunal did not fall under s49D but was merely a settlement in the ordinary course of litigation. *Glaxo Smithkline South Africa decision – Case No: 62/CAC/Apr06*.

the settlement agreement which acknowledged Fourier's rights to apply for declaratory relief in terms of section 58(1)(a)(v) or (vi) of the Act, in respect of its complaint under section 5(2).

6. Fourier has now sought declaratory relief in respect of not only the section 5(2) case but also in respect of the section 5(1) and 8(c) cases.
7. Apart from this dispute between the parties there is also a pending High Court matter in which Fourier admitted that it is indebted to BMW in the amount of R1 863 557.01 in respect of goods delivered to Fourier under a dealership agreement. Fourier however counterclaims that it has an un-liquidated claim for damages against BMW as a consequence of the alleged anti-competitive conduct (the subject of this complaint) by BMW which once liquidated, will set off and extinguish BMW's claim against Fourier. That matter has been postponed pending the Tribunal's determination of the alleged anti-competitive conduct.

Incompetent application

8. We first deal with Fourier's application for relief in terms of section 5(1) or section 8(c) of the Act. BMW argues that because the Commission had withdrawn its section 5(1) and/or 8(c) case against BMW, the only case that Fourier could seek relief for in terms of section 58(1)(a)(v) or (vi) of the Act was the case in respect of section 5(2). Further that if Fourier wanted to seek a declaratory order for a contravention of 5(1) and/or 8(c) it ought to bring such an application under section 51(1) of the Act. The reason for this according to BMW is that the withdrawal by the Commission has the practical effect of a non-referral of sections 5(1) and 8(c) cases. Fourier could competently only approach this Tribunal in terms of section 51(1) of the Act. Also that such a referral ought to have been brought within 20 days of the date of the Commission's withdrawal.
9. The Commission withdrew the case on 11 November 2009. Fourier had lodged its application in April 2010, some five months later with no explanation and

therefore, according to BMW, Fourier was out of time. For this reason BMW argues that the application ought to be dismissed.

10. We understand that BMW's contention here is not that the complainant is not entitled to pursue its complaint but that it should do so under section 51(1) and not section 58(1)(iv) or (v). Once the complaint is to be shoehorned into section 51(1) then the time periods applicable to that section ought to apply to the complaint. Given that the application was filed some five months after the Commission's withdrawal it ought to be dismissed for non-compliance alternatively a formal condonation application must be filed by the applicant.²
11. Fourier argued that it had always declared its intention to pursue a section 5(1) and/or 8(c) case against BMW. This was apparent from its complaint lodged with the Commission. While the Act is clear on what happens when a matter is non-referred or deemed as such, it is silent on what happens in circumstances where the Commission withdraws a complaint after having referred it. This is why the applicant did not rely on section 51(1) of the Act to self-refer its complaint in terms of sections 5(1) and 8(c). However it was entitled to bring the application on Notice of Motion as provided for in rule 42(1) of the Tribunal Rules. If however the Tribunal was minded to direct that the section 5(1) and 8(c) complaints can only be brought in terms of section 51(1) and that the Commission's withdrawal amounted to a non-referral then the applicant is not out of time in making the referral because the clock would only start ticking once the Tribunal has made such determination.
12. Counsel for Fourier argued that condonation was not necessary because no irregularity had occurred because the Act and rules were silent on the matter. All that the applicant was required to do was to file its application on Notice of Motion and comply with the above-mentioned Rule 42.³
13. It was common cause that this was not a referral in terms of section 65(2) of the Act.

² See transcript pages 37-38.

³ Rule 42 regulates the initiation of proceedings not otherwise provided for in the rules. It requires an application to be brought on Notice of Motion and Form CT 6.

14. The procedure for initiation and referral of complaints can be found in sections 49B, 50 and 51. Section 49B(1) deals with complaints initiated by the Commission itself and is not pertinent to this case. Section 49B(2)(b) provides that any person may submit a complaint against an alleged prohibited practice to the Commission. The Commission upon receiving such a complaint is required to conduct an investigation and to refer the complaint to the Tribunal if it determines that a prohibited practice has been committed.⁴ The Commission may refer all or some of the particulars of the complaint. The Commission may also decide not to refer a complaint or aspects of a complaint to the Tribunal. If it decides on the latter then it may issue a notice of non-referral. Where it does not issue such a notice but does not refer the complaint to the Tribunal, the complaint is deemed to be non-referred within one year of being submitted or an extended period that may have been agreed between the Commission and a complainant.⁵
15. There is no dispute between the parties that Fourier was a complainant as contemplated in section 49B(2). In other words this was not a complaint that had been initiated by the Commission *mero motu* but had been initiated by Fourier alleging that BMW had acted in contravention of sections 5(1), 8(c), 8(d) (ii)⁶ and 5(2). The only dispute is whether this application should have been brought within 20 business days from the date of the Commission's withdrawal as if it was a section 51(1) referral.
16. Section 51(1) provides that a complainant may refer the complaint directly to the Tribunal in the event of a non-referral by the Commission. It is important to emphasise here that a notice of non-referral does not extinguish a complainant's complaint. All it does is remove the Commission as *dominis litis* from the case. The Commission by issuing a notice of non-referral or as a consequence of a deemed non-referral indicates to the public and the complainant that it does not wish to prosecute this complaint before the

4 Sections 49B(3) and 50.

5 Sections 50(2)-(5).

6 Mistakenly referred to as 8(d)(i) by the Commission in its referral.

Tribunal.

17. The effect of the Commission's withdrawal was that the Commission was no longer a party to the dispute. This however did not remove the complaint.
18. Tribunal rule 14(1) regulates the initiation of complaint proceedings in the Tribunal. Tribunal rule 14(1)(a) regulates the referral by the Commission. No time periods are provided for this in the rules but the Commission is placed under time limits in section 50. Rule 14(1)(b) provides that a complaint referral in terms of section 51(1) must be filed within 20 business days after the Commission has issued or deemed to have issued a notice of non-referral. Rule 14(1)(c) regulates a referral by a party in a civil action in a civil court to the Tribunal. Again no time periods are provided. The rule is silent on any other type of referral to the Tribunal.
19. None of the provisions of the Act or the Tribunal Rules provide for a situation where the Commission elects to withdraw a case after it has referred it to the Tribunal and a complainant wishes to self-refer the matter.
20. The Commission's withdrawal of the section 8(c) and 5(1) complaint after referral certainly poses a quandary for the complainant. On the one hand the practical effect of the withdrawal leads to the elimination of the Commission as party to the complaint proceedings, in the same way that a non-referral or deemed non-referral would have done. On the other hand, the Act's silence on this issue leaves the complainant with uncertainty as to the status of that complaint. It is no surprise then to see that Fourier was uncertain whether it should refer this complaint to the Tribunal in terms of section 51(1) or some other provision of the Act.
21. Significantly the Tribunal Rules are also silent on a complainant's rights to seek relief from the Tribunal in terms of section 49D(4). A complainant who wishes to seek a declaratory order after a confirmation of a consent order is not placed under any time periods from date of confirmation of the consent order within

which it must lodge such application. Ironically the objection of a late filing is not available to BMW in respect of the section 5(2) case.

22. We have previously stated that the Tribunal's proceedings are *sui generis* in nature. While we have the discretion to have regard to relevant rules of the High Court⁷ we enjoy a wide discretion in the conduct of our proceedings.⁸ Our proceedings are adversarial in form but we are vested with inquisitorial powers to arrive at the truth.⁹ We are required to conduct our proceedings with fairness and to guard against elevating form over substance. Fairness is context driven and we must have regard to the circumstances of each case to make such a determination.¹⁰

23. In this case given that the application is already before us we find that it is unnecessary to decide whether it ought to have been brought under section 51(1) or some other section of the Act. In our view fairness requires that Fourier's rights as a complainant ought not to be prejudiced simply because the Commission at some later stage decided not to pursue a complaint. Given that no prejudice can be complained of by BMW by the filing of the section 5(2) case (where no time limits are prescribed for an application under section 49D (4) at this point in time we fail to see what prejudice is caused to BMW by the filing of a complaint referral, for which no time limits are prescribed, a few months after the Commission's withdrawal. Nothing can be gained to artificially require the applicant to now bring a formal condonation application in circumstances where the Act and Tribunal Rules are unhelpful. Indeed it would be advantageous for all parties concerned to deal with the entire complaint in one application rather than in separate applications. BMW's objection is dismissed and the application is allowed. To the extent that condonation is required because the section 5(1) and 8(c) complaint was brought under sections 49D(4) or 58(1)(a)(v)¹¹, this is

7 Tribunal rule 55(1).

8 Section 55 and Tribunal rule 55.

9 *Commission and Anglo American Medical Scheme et al v United South African Pharmacies et al Case No: 4/CR/Jan02; and National Association of Pharmaceutical Wholesale et al v Glaxo Wellcome et al 45/CR/Jul01.*

10 Rooibos decision Case No: 129/CR/Dec08, *Menzi Simelane & Others v Seven-Eleven Corporation & Others Case No: 480/2001 – CLR (2001-2002) CPLR 13 (SCA) para 16.*

11 It was not clear from the Notice of Motion which section of the Act was being relied upon. However in paragraph 6 of the founding affidavit the deponent states that the application is brought under section 58(1)(a)(v).

granted.

The Pleadings Objection

24. In respect to its objection on the pleadings, BMW argues that Fourier's application is vague and embarrassing in that it lacks the necessary particularity regarding the material facts of its case to enable BMW to know what case it is required to meet. Initially BMW argued that the vagueness in the pleadings arose in that Fourier failed to allege in respect of its complaint under sections 5(1), 5(2) and 8(c), the time periods over which the alleged prohibited practices endured. However, in Fourier's heads of arguments, Mr Fitchner clarified that the relevant period is January 2000 to March 2003.

25. The remaining objections by BMW are that Fourier's case under section 5(2) is not substantiated sufficiently to enable it to answer such complaint meaningfully, and finally that it is not clear what Fourier argues is the relevant market(s) to enable BMW to answer on a meaningful basis the allegations of dominance in that market or markets.

26. In respect the section 5(2) complaint BMW contends that Fourier does not allege material facts such as:

26.1 the factual basis for the allegation that authorized dealers are not permitted to deviate by charging less than the list prices; and

26.2 whether it is being alleged that BMW prevented authorized dealers from charging less than list prices; and if so:

26.2.1 in what manner BMW prevented such conduct;

26.2.2 when did BMW prevent such conduct;

26.2.3 who on behalf of BMW prevented such conduct; and

26.2.4 which dealers were prevented from engaging in such conduct.

27. Further with regards to Fourier's allegations of threats of sanctions for failure to adhere to the price lists by BMW, BMW contends that there are no material facts to discern:

27.1 who on behalf of BMW made such threats;

27.2 to which dealers such threats were made; or

27.3 when such threats were made.

28. In relation to market definition, BMW argues that Fourier's market definition is wholly unspecified and unclear, particularly in regard to the relevant upstream market. It argues that this is not sufficiently clear for it to discern whether the relevant upstream market is alleged to involve the market for the importation, distribution and sale of touring and leisure motorcycles, and or sports touring motorcycles, with the engine capacities mentioned. BMW also argues that it is not clear whether Fourier alleges that there are separate relevant markets for accessories and rider equipment, or whether these form part of the broader motorcycle market.

29. In response to this application, Fourier firstly denies that its application is vague and embarrassing, arguing that its application provided BMW with sufficient particularity to enable it to plead. Furthermore, Fourier contends that even if its application was as contended by BMW, BMW failed to afford it the opportunity to remove the cause of the complaint through prior notice.

30. The Tribunal has previously set out its approach to exceptions to pleadings. While we have the discretion to have regard to the rules of the High Court we have emphasised that the *sui generis* nature of our proceedings, where parties are required to file witness statements and assist parties to know the case against them. We are cautioned against adopting an over-technical approach to pleadings and are required to assess applications of this sort on the basis of fairness.

31. Although the Tribunal's general approach to pleadings has historically been less stringent than that of the High Court, the Tribunal has reiterated that pleadings

should adhere to Rule 15 of the Tribunal Rules. In particular Rule 15(2) of these Rules which provides that a complaint referral must contain not only a concise statement of the grounds of the complaint but also the material facts and points of law relevant to the various aspects of the complaint being alleged. This is important so that respondents understand the case being made out against them to enable them to reply thereto. We assess each case in its context.

32. In relation to market definition, Fourier states that it adopts the definition of the relevant market as used by the Commission.¹² This is then further expanded upon in paragraphs 43 and 44 of its application.
33. In paragraph 43 of the application, the relevant upstream market is defined as that for the importation, distribution and sale of touring and leisure motorcycles, in particular and for purposes of this complaint, sports touring motorcycles (which fall within the segment touring and leisure) with engine capacities of 650cc and 1200cc, accessories as well as BMW rider equipment (“the products”). This has been taken verbatim from paragraph 41 in the Commission’s referral.
34. In paragraph 44 the relevant downstream market is defined as that “for the on-sale of the product by the authorized dealers of the respondent including the complainant when it was an authorized dealer, to end users.” This is the same downstream market defined by the Commission in paragraph 42 of its referral.
35. In both the Commission’s referral and in this application the markets are described - the upstream market has in it “motorcycles of engine capacity 650cc and 1200cc, accessories pertaining to these motorcycles and rider equipment”.
36. The complainant’s world view of the market clearly incorporates a number of products. It is these products that are imported, distributed and sold to dealers. The relevant downstream market is described simply as the market for the on-sale of these products to end-users. While the market has been defined as such, it is difficult for the reader of the pleadings to gauge from this definition

¹² Paragraph 35 FA.

who the other players in the market are and on what basis the alleged market share of 45% is computed. This raises a number of questions. Is the market only that for BMW products or does it include other manufacturer's products? Is market share calculated on the basis of turnover? If so does it include total turnover or only that of motorcycles? Is it alleged that BMW enjoys dominance in all the products listed in that relevant market or only in motorcycles?

37. In relation to the section 5(2) objection, we find that BMW's objection is more in the nature of a request for further particulars rather than an exception. Paragraphs 49 – 52 set out the basis for this complaint. The deponent cites the relevant paragraphs of the dealership agreement that deals with prices and then sets out in paragraph 52 what occurred in practice. The deponent alleges that a price list was provided by BMW to dealers, that it did not indicate on the list that the prices were not binding on the dealers and that compliance with the price list was monitored through the reporting obligations imposed by BMW in clause 7.4 of the dealer agreement. BMW is able to determine from this reporting whether a dealer has deviated from the price lists, and the extent of the deviation and that there was a threat of termination of the dealership if these prices were not adhered to. In paragraph 16.5.2 the deponent alleges that where a dealership attempted to discount in contravention of the stated policy, BMW decreased the dealer margin, thereby limiting the ability of the dealership to discount, "starved" the dealership of product and/or cancelled the dealership agreement.

38. Tribunal rule 15 requires that an application be accompanied by a concise statement of the grounds of the complaint and the material facts relevant to the complaint and relied upon by the complainant. We have previously assessed compliance with this rule on the basis of fairness and enquiring whether sufficient facts are alleged so as to enable the respondent to answer in a meaningful way.

39. From the quoted paragraphs all that the respondent knows is that there is a section 5(2) allegation against it and that dealers had been subjected to broadly speaking threats and sanctions in order to ensure compliance (the manner). What it does not know is the identities of the players and when such

sanctions/threats took place. In our view and in the context of this case, where uncertainty and delays have been visited upon the complaint, it would help a great deal if Fourier provided BMW with the particularity that it seeks at this stage of the proceedings.

The Order

40. We therefore grant the following order:

- A. The application for dismissal is denied and condonation for Fourier's application for a declaratory order (self-referral) of the section 5(1) and/or section 8(c) case is hereby granted.
- B. In relation to the pleadings, Fourier must within 10 business days of date hereof, file a supplementary affidavit in which the following issues are clarified/expanded upon -
 - a. Whether the relevant markets described in paragraphs 43 and 44 of its founding affidavit include only BMW products;
 - b. Provide details of how BMW's alleged market share in paragraph 62 of the founding affidavit was computed;
 - c. In relation to paragraphs 16.5.2 and 52.5 of the founding affidavit-
 - i. who on behalf of BMW prevented the granting of discounts;
 - ii. which dealers were prevented from engaging in such conduct;
 - iii. who on behalf of BMW made such threats;
 - iv. to which dealers such threats were made; and
 - v. when such threats were made.
- C. BMW must file its answer to the founding affidavit read with the supplementary affidavit within 20 business days of the filing of the supplementary affidavit.
- D. Fourier may file its replying affidavit within 5 business days of the filing of the answer.
- E. There is no order as to costs.

Yasmin Carrim

Presiding Member

Concurring: Andreas Wessels and Medi Mokuena

Tribunal Researcher : Londiwe Senona

For the Commission : Adv. Maenetje instructed by the Commission

For the Applicant : Adv. Wilson instructed by MacRoberts Attorneys

For the Respondent : Adv Engelbrecht instructed by Johan Strauss
Incorporated