

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no. 09/CR/Jan07

In the matter between

THE COMPETITION COMMISSION

Applicant

and

**ALLEN MESHCO (PROPRIETARY)
LIMITED**

First Respondent

**WIREFORCE STEELBAR (PROPRIETARY)
LIMITED**

Second Respondent

HENDOK (PROPRIETARY) LIMITED

Third Respondent

**INDEPENDENT GALVANISING (PROPRIETARY)
LIMITED**

Fourth Respondent

**ASSOCIATED WIRE INDUSTRIES (PROPRIETARY)
LIMITED**

Fifth Respondent

Panel : N Manoim (Presiding Member), Y Carrim (Tribunal Member),
and L Reyburn (Tribunal Member)

Heard on : 13 February 2008 and 17 July 2008

Order Issued : 23 July 2008

Reasons Issued: 23 July 2008

DECISION AND ORDER REGARDING RESPONDENTS' POINTS IN LIMINE

- 1] This matter arises from a complaint lodged on 19 December 2003 with the Competition Commission ('the Commission') by Barnes Fencing Industries (Proprietary) Limited, F&G Quality Tubes (Proprietary) Limited, and Dunrose (Proprietary) Limited (collectively, 'the Complainants'), alleging that Allen

Meshco (Proprietary) Limited, Wireforce Steelbar (Proprietary) Limited, Hendok (Proprietary) Limited, Independent Galvanising (Proprietary) Limited, and Associated Wire Industries (Proprietary) Limited (collectively, 'the Respondents') had engaged in collusive horizontal practices amounting to illegal price-fixing in terms of section 4(1)(b)(i) of the Competition Act, 1998 (as amended) ('the Act').

- 2] On 15 January 2007, more than three years after the lodging of the complaint, the Commission referred the complaint to the Tribunal in terms of Section 50 of the Act.
- 3] In the Commission's founding affidavit in support of the referral, Mr Madiba, the Commission's representative, stated that the Complainants and the Commission had agreed in terms of Section 50(4) of the Act to extend the period of one year which is contemplated in Section 50(2) for the referral of a complaint to the Tribunal after lodging of the complaint with the Commission.¹
- 4] In the Respondents' answering affidavit, Mr Allen, the Respondents' representative, raised a number of points *in limine* which in his submission justified the dismissal of the complaint.²
- 5] A hearing of the Tribunal on the points *in limine* began on 13 February 2008. At that hearing the Respondents' counsel, Mr Pretorius, stated that the Respondents were persisting with only one of these points, namely an assertion that the alleged extension of the one-year period referred to above had been irregular and that in fact no proper extension had taken place.³ In these circumstances, he asserted, the complaint had lapsed irretrievably.
- 6] The Tribunal considered that insufficient factual evidence was before it to rule on this assertion, and ordered the Commission to furnish evidence in affidavit form regarding the extensions in question.⁴

¹ See record 4.

² *Ibid* pages 14-17.

³ See pages 1-2 of transcript dated 13 February 2008.

⁴ *Ibid* pages 34-39.

- 7] In response to that order the Commission filed an affidavit on 28 February 2008 in which its representative, Mr Mateane, set out an account of events which, in his submission, demonstrated that there had been an unbroken chain of 15 extensions agreed to by the Complainants and the Commission over the relevant period. He attached to this affidavit 15 documents which, he said, constituted this series of consents to extensions. A supporting affidavit by Mr Doron Barnes on behalf of the Complainants confirmed these assertions.
- 8] An affidavit was then filed on behalf of the Respondents in which their representative, Mr Allen, harshly criticised the Commission's conduct and its evidence regarding the 15 extensions, and asserted that vital factual material had not been revealed by the Commission. Accordingly, the Respondents filed notices under High Court Rules 35(11), (12), and (14) requiring the production of documents from the Commission's files which led up to the signing of the 15 extension documents referred to above.
- 9] An affidavit by Mr Ralekwa, of the State Attorney's office, representing the Commission, was filed in response, alleging that the discovery notices under Rule 35 had been irregularly called for.
- 10] The Respondents' attorney, Ms Kraamwinkel, then filed an affidavit denying the irregularity alleged by the Commission, but containing an alternative application for discovery to be ordered on the basis of the above-mentioned notices under Rule 35; in other words, a request that those notices be regularised.
- 11] This was in brief the state of affairs when the Tribunal was to have resumed the hearing on 24 June 2008. On that date, however, the parties' representatives informed the Tribunal in chambers that they had reached agreement that the Commission would produce documents from its files for the Respondents' scrutiny to enable the Respondents to ascertain whether or not the 15 extensions had been properly made to constitute the unbroken chain for which the Commission contended.
- 12] A hearing to finalise the point *in limine* was arranged for 17 July 2008 following

the production of the documents in question.

- 13] On 15 July 2008, thus two days before this scheduled hearing, the Commission served an affidavit on the Tribunal and on the Respondents in which Mr Mateane stated that it had recently been drawn to his attention by the Commission's counsel that an essential document constituting one of the links in the above-mentioned chain and covering a period of some 13 days in December 2006 was missing. As this document could not be found in the Commission's files, Mr Mateane contacted Mr Barnes and requested his assistance in tracing the missing document. Mr Barnes had been able to provide this document, and it was attached as an annexure to Mr Mateane's affidavit. A supporting affidavit by Mr Barnes was supplied, confirming Mr Mateane's assertions in this regard.
- 14] These affidavits led the Respondents to address a letter through their attorneys to the Commission and to the Tribunal, dated 17 July 2008, calling for Mr Barnes to be in attendance at the hearing on that day and to bring with him all documents in his possession relating to the extensions.
- 15] At the hearing on 17 July 2008, Mr Pretorius protested that the affidavit of 15 July 2008 of Mr Mateane and its annexures had placed the Respondents in an untenable position since the Respondents had been unable to react to this new evidence by making necessary investigations and in particular requiring discovery of further documents they might have concluded were relevant. Focusing on two of the extension documents which he considered to be suspicious, namely one purportedly signed by Mr Barnes on 30 October 2006 (Exhibit B in the proceedings) and another dated 30 November 2006, also purportedly signed by Mr Barnes (Exhibit A), Mr Pretorius contended that the *ex-facie* condition of these documents and differences which he claimed existed between them and other of the extension documents in the evidence justified a further postponement of the proceedings and the undertaking of far-reaching further discovery.
- 16] Mr Maenetje, representing the Commission at this hearing, pointed out that Mr Barnes was present with his file of relevant documents and had indicated that

he was willing to give oral evidence in an attempt to dispel all misgivings and misunderstandings. On this basis the Tribunal ruled that Mr Barnes should take the stand and give evidence, but an opportunity of a half-hour adjournment was given to the Respondents' representatives to examine Mr Barnes' file of documents before he testified.

17] Following the adjournment, Mr Barnes testified⁵ that he had been mandated at all times to represent all of the Complainants in their dealings with the Commission, and that he had been fully aware of the need under Section 50 of the Act for the Complainants to reach agreement with the Commission regarding extensions of the one-year initial period contemplated in the Act for the Commission to make its investigations and submit a referral of the complaint to the Tribunal. He had personally negotiated all of the extensions, firstly in telephone discussions in which he had made it plain that he was only willing to consent to short periods of extension, and he had personally signed all but one or two of the extension documents. On his understanding, his oral arrangements with the Commission in these telephone conversations had constituted consent to an extension for each relevant period, and an extension document had been prepared and signed on each occasion after oral consensus had been achieved. The signed documents were in his view therefore simply a confirmation of the existence of the extension.

18] Mr Barnes stated that he had on some occasions been sent an extension document by the Commission by fax or e-mail for signature and dating, but on other occasions he had prepared the document by adapting or editing a previous version on his computer system, the process involving the substitution on the document of the dates mentioned in it by fresh dates. The form itself bore the name and logo of the Commission. The form as completed by his signature and the insertion by hand of the date of signature was then faxed by his secretary to the Commission.

19] Mr Barnes emphasised that the complaint was of great importance to the Complainants' businesses and that they had been aware of the importance of obtaining valid extensions on each occasion to enable a legitimate referral to

⁵ See pages 15-33 of the transcript dated 17 July 2008 for Mr Doron Barnes' oral testimony.

be made by the Commission on completion of its investigations.

- 20] Mr Barnes could not remember who had been the responsible official representing the Commission on some of the occasions when extensions had been negotiated and agreed upon, and pointed out that there had been considerable turnover during the relevant period in the personnel of the Commission dealing with the complaint. It was also uncertain where he had been on some occasions when telephonic contact had been made between him and the responsible official of the Commission as he travelled frequently in the course of visiting the Complainants' offices in various parts of the country. He could also not be sure that complete records existed in his office of all faxes and covering sheets for completed extension documents transmitted to the Commission as the Complainants' fax system was a rudimentary one and the process of filing documents in his office had not been wholly systematic. To the extent that these documents were in his possession, they were in the file which had by now been inspected by the Respondents' representatives.
- 21] Under cross-examination by Mr Pretorius, Mr Barnes rejected the allegation that he had been forging a Commission document when altering the extension form in the manner he had described, pointing out that the Commission had been content to receive the documents he had adapted and signed, and that no third party had been involved in the exchange of the documents between himself and the Commission. The document was in any case simply a form and in his view it was irrelevant who adapted it on each occasion. As to the existence of fax and telephone records which might verify his statements concerning his communications with the Commission, he emphasised that such records might not be in existence or might be widely scattered in view of his business travels and his basic fax system.
- 22] Mr Pretorius made it plain that he was left unsatisfied by Mr Barnes' evidence, but the Tribunal has no hesitation in accepting it in all respects. It was convincingly delivered and is entirely consistent with the economic interests of the Complainants and with the documents placed in evidence by the Commission.

23] Mr Pretorius' calls in closing argument for further time and for further rights to require discovery regarding records referring to the extensions would, if granted, extend beyond all reasonable bounds the already strained limits of the investigation demanded and received by the Respondents, and would amount to nothing more than a wild goose chase.

24] It must be remembered that the Respondents have a steep hill to climb in attacking the convergent evidence of the Commission and the Complainants that they had reached consensus on all the relevant extensions. The Commission and the Complainants alone were the parties to the extensions, they confirm that all the extension consents were mutually given, and Mr Barnes has cogently confirmed the negotiation and conclusion of all of the extensions. Despite some lapses or gaps in the Commission's documentary records as revealed in the evidence before the Tribunal, Mr Barnes' evidence has clinched the matter and it is clear that there was no break in the chain of extensions throughout the relevant period. Mr Pretorius' fulminations to the contrary are unavailing.

25] However, the case has not revealed the procedures and record-keeping of the Commission in a reassuring light. Section 50 of the Act has an important role in the scheme of the Act regarding the lodging and prosecution of complaints of contraventions of its provisions.

26] The relevant parts of Sections 50 and 51 of the Act read as follows:

50 (1)

 2) *Within one year after a complaint was submitted to it, the Commissioner must –*

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

(3)

(4) In a particular case –

(a) the Competition Commission and the complainant may agree to extend the period allowed in subsection 2.....

(b)

5) *If the Competition Commission has not referred a complaint to the Competition Tribunal, or issued a notice of non-referral, within the time contemplated in subsection (2), or the extended period contemplated in subsection (4), the Commission must be regarded as having issued a notice of non-referral on the expiry of the relevant period.*

51. (1) *If the Competition Commission issues a notice of non-referral in response to a complaint, the complainant may refer the complaint directly to the Competition Tribunal, subject to its rules of procedure.*

27] If a complaint is lodged and after due investigation the Commission proceeds with a referral and vigorously wields the cudgels in the ensuing case before the Tribunal, the complainant should have the benefit of knowing that the case is being taken seriously and that the skills and resources of the Commission, which are ultimately public resources, are being used to act against the alleged wrongdoers. The complainant is thus spared the cost and inconvenience of conducting its own prosecution. If the Commission by neglect were to fail to secure just one necessary extension, for example if a complainant were not to have as diligent a representative as Mr Barnes, who clearly took the initiative in securing at least some of the extensions affecting the Complainants in this case, the Commission's rights to proceed with the complaint will lapse. The complainant will then be faced with the dilemma of having to proceed with a prosecution using its own resources, or seeing the complaint lapse and pass into oblivion. (As another alternative the complainant might lodge a fresh complaint, but this would be at the cost of some time lost under the doctrine of prescription, and evidence of continuation of the restrictive practice would be required.)

28] If a firm accused of a restrictive practice is able to show that a necessary extension was not obtained or was improperly obtained, it accordingly gains the obvious advantage flowing from the lapsing of the complaint in the hands of the Commission.

- 29] The one-year limitation in Section 50(2) is there for the benefit of the complainant: it helps to ensure that a complaint is speedily attended to by the Commission and not unduly dragged out. An astute complainant will only consent to an extension on being satisfied by the Commission that there is good reason for it, and has the power to bargain with the Commission over the extra time needed by way of extension. In the application of Section 50(2) it is accordingly necessary to look to the interests of the complainant in the first place in ensuring that the section has been correctly and fairly implemented. In these circumstances it is clear that the Commission's duty to attend to the task of negotiating and obtaining necessary consents to extensions is a serious one, and that there is moreover a corollary administrative duty of maintaining complete, accurate, and accessible records of all extensions concluded.
- 30] The Act does not specify the manner in which consent to an extension under Section 50 should be negotiated, concluded, or recorded. It is open to the Commission to use either oral or written communications to obtain the consent, although clearly a written record is desirable for the sake of avoiding disputes and *contretemps* of the type which have beset this case.
- 31] Mr Pretorius at one point suggested that the evidence showed that the Commission had elected to use written communications to obtain the necessary consents to extensions. This submission was not supported by the evidence, and Mr Barnes' evidence directly contradicts it. It is clear that the Commission's normal practice was to seek oral consent to an extension and then, by way of confirmation, get a signed consent document from the complainant. There is, however, a measure of ambiguity in the wording of the form used by the Commission for its extensions, since if it is merely confirmatory of an oral consent to the extension its significance is not immediately apparent.
- 32] The absence of accessible records in the Commission's files of all the extensions granted in this matter, and the difficulties faced by Mr Mateane in attempting to reconstruct the chain of evidence, also suggest that a thorough review by the Commission of its practices in regard to extensions under

Section 50 is required. It is accordingly urged on the Commission that it takes this matter in hand.

Tribunal's order

In the circumstances, the Tribunal makes the following order:

- 1) The Respondents' points *in limine* are dismissed.
- 2) The parties are required to bear their own costs regarding the points *in limine*.
- 3) The parties are required to consult with one another and with the Registrar of the Tribunal regarding a date for the hearing of the complaint.

L Reyburn

Tribunal Member

23 July 2008

DATE

N Manoim and Y Carrim concur in the judgment of L Reyburn

Tribunal Researcher : R Kariga

For the Commission : NH Maenetje, instructed by the State Attorney

For the respondents : W Pretorius, instructed by Roestoff Venter and Kruse Attorneys.