COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 02/CR/Jan01
25/CR/May01

In the consolidated matters between:

Avalon Group (Pty) Ltd	**First Complainant**
Videovision Entertainment (Pty) Ltd	**Second Complainant**
and	
Old Mutual Properties	**First Respondent**
Old Mutual Life Assurance CO South Africa Ltd	**Second Respondent**
Primedia Ltd	**Third Respondent**
Ster-Kinekor Films (Pty) Ltd	**Fourth Respondent**

Reasons for decisions made at pre-hearing conference held on 24 June2002

PART A

Discovery application

At a pre-hearing conference in this matter held on 24 June 2002 I was asked to rule on two applications to compel further and better discovery brought by the First and Second complainants.

BACKGROUND

In this matter the Tribunal has consolidated two claims brought by the Complainants in respect of the Gateway shopping Centre in Durban. The first and second respondents, whom for convenience I will refer to as Old Mutual, respectively own and manage the Gateway shopping Centre. In 1998 Old Mutual asked firms in the film exhibition industry to tender for the cinema rights at the

shopping centre. The complainants and the third respondents, inter alia, submitted bids. Old Mutual decided in 1998 to award the tender to the third respondent. On 14 March 2000 it entered into a lease (the 'March lease') with the third respondent in respect of Gateway. A further lease agreement (the 'November lease') was entered into on 14 March 2001.

On 24 November 1999 Videovision filed a complaint with the Competition Commission against the respondents. Avalon filed a complaint with the Commission on the 18 February 2000. Both complainants received notices of non-referral from the Commission and proceeded to refer the complaints to the Tribunal directly. As both complaints covered similar factual and legal issues all parties agreed to the complaints being consolidated.

In essence the complaint referrals make the following allegations:

1. That the lease entered into the between the second and third respondent constitutes a vertical restrictive practice in contravention of section 5(1) of the Competition Act (the 'Act');
2. As per Avalon, that it should have been given access to the Gateway Cinema complex pursuant to its tender as an essential facility on terms reasonably required and that those terms should be no more onerous than those granted to Ster-Kinekor Films Proprietary Limited.
3. That the award of the Gateway cinema complex to Ster- Kinekor or alternatively its denial to the complainant constitutes an exclusionary act as contemplated by section 8(c) of the Act.

Although the Tribunal rules make provision for discovery there are no procedural rules to regulate the process. Rule 22(c)(v) merely provides that at a pre-hearing conference the assigned member may give directions in respect of the production of documents whether *'formal or informal'*. However in terms of Rule 55 of the Tribunal Rules, the Tribunal is entitled to have regard to the procedures of the High Court where there is a lacuna in its own rules. Accordingly, at the pre-hearing conference held on 8 April 2002, I directed that discovery should be made in accordance with the Rules of the High Court.[1] All the parties have since filed discovery affidavits. The complainants have, as they are entitled to in terms of my April ruling, filed applications to compel further and better discovery.

I have not heard complete argument in relation to all the outstanding discovery issues, but I have been asked to make a ruling on the parts of the application that I have heard thus far.

1 See paragraph 7 of the Record of proceedings of the pre-hearing conference.

Items in respect of which further and better discovery is sought

Avalon and Videovision seek in respect of Old Mutual and / or Ster –Kinekor:

1. Discovery of the November lease agreement. (Item 10 of Annexure A to Legh's affidavit in Videovision's application for further and better discovery dated 22 May 2002)

Videovision seeks in respect of Old Mutual:

2. Old Mutual Marketing plans – (item 14 of Annexure A to Robert Legh's affidavit dated22 May 2002.)

3. Source documents in respect of:

    a) Item 197 of Ian Watt's discovery affidavit, First part of first Schedule, dated 7 May 2002 (Item 15 of Annexure "A" of Robert Legh's affidavit dated 22 May 2002.)

    b) Item 198 Ian Watt's discovery affidavit, First part of First Schedule, dated 7 May 2002 (Item 16 of Annexure "A" of Robert Legh's affidavit, dated 22 May 2002.)

    c) Item 264 Ian Watts discovery affidavit, First part of First Schedule, dated 8 May 2002 (Item 17 of Annexure "A" of Robert Legh's affidavit dated 22 May 2002.)

4. Old Mutual documentation on research that formed the basis of the leasing policy and tenant mix strategy of the Gateway Shopping Mall (Item 18 of Annexure "A" of Robert Legh's affidavit, dated 22 May 2002.)

Videovision seeks in respect of Ster-Kinekor:

5. All Ster-Kinekor documents relating to marketing and market research in respect of its cinemas in KwaZulu Natal (item 14 of Annexure "C "of Robert Legh's affidavit, dated 22 May 2002)

I will now deal with the requests seriatim. Where possible I have tried to deal with the issues thematically.

1. **Discovery of a lease agreement concluded on 14 November 2001- (Item 10 of Annexure "A" to Robert Legh's affidavit of 22 May 2002)**

Both Complainants seek the November lease in respect of both the commercial and art cinemas at the Gateway complex. (See Affidavit of Legh paragraph 4.10 and item 10 of annexure A thereto).

In its first discovery affidavit Old Mutual discovered the March lease agreement between OMLACSA and Ster-Kinekor. However according to Watt (See Old Mutual's answering affidavit paragraph 15) a further agreement between the parties was concluded on 14 November 2001. Watt says he has not discovered this agreement because it had no bearing on the decision to choose Ster-Kinekor as the preferred bidder for the cinema component of Gateway, nor on the decision to conclude the March lease. Watt justifies not discovering the November lease, after having discovered the March lease, because the November lease arose from different circumstances, which occurred subsequent to those that prevailed in the period 1998-2000. Furthermore the November agreement post-dates any of the complaints or the complaint referrals in this matter. Watt then goes on to tender the agreement to the Tribunal under a claim for confidentiality. I understand this to mean that only the Tribunal but not the claimants would have sight of this. It appears further from Watt's affidavit that Old Mutual is concerned that the lease could if its contents became known disadvantage Old Mutual in its negotiations with future tenants of either Gateway or its other centres.

In reply Videovision argues that the November lease is relevant to the question of whether the Ster-Kinekor bid was objectively more favourable than the others. If in the November lease it had procured easier terms it might cast the bidding contest in a different light. Avalon, which has premised its dominance case on a single economic entity theory, argues that the November lease is relevant to establishing the nature of this relationship.

I indicated to the parties that I would at this stage decide the relevance of the document only and leave the aspect of its confidential status and who should have access to it to a full panel. I have with everyone's consent proceeded in this manner.[2]

Central to both complainants' prayers for relief in terms of section 5 of the Act is the voiding of the lease agreement. It seems to me that it is highly relevant to the adjudication of such relief to have the present version of the lease before us. It therefore is not relevant that the terms of the lease have evolved since the laying

2 I have followed the same approach in respect of the remaining documents to be discovered.

of the complaint or the lodging of the complaint referrals. To adjudicate only in respect of the March lease, which is now historical, in whole or in part, is farcical. Assuming we were to decide to accept the complainant's remedies it would mean us voiding an agreement that we had never seen.

I am also in agreement with the complainants that the November lease is relevant to establish the nature of the respondents relationship and secondly whether it casts a different light on the credibility of the tender process.

The November lease and any subsequent amendment must be discovered subject to the determination of any confidentiality claims.

2. Old Mutual Marketing plans – (item 14 of Annexure "A" to Robert Legh's affidavit of 22 May 2002.

This item according to Videovision is relevant because it relates to the dominance of Old Mutual in the market for the provision of suitable space to exhibit movies in the Durban North Region. Old Mutual denies this and criticizes the request for inter alia, failing to specify any document, its unlimited nature as to time and the fact that it does not enable Old Mutual to establish which documents are being sought.[3] Old Mutual points out that the request refers not only to the cinema complex but also to other aspects of the Gateway shopping mall and includes rental rate comparisons with other shopping centres in the area.

In its complaint referral Videovision alleges that Old Mutual is dominant in the whole of the RSA in the market for the letting of space for the operation of cinemas and makes the same allegation in respect of the market for the greater Durban area and Durban North.

It is difficult to see how the information requested is relevant to the issue Old Mutual's alleged domination in this market.

Evidence that a firm is dominant for the purpose of section 7 of the Act can be established in two ways; either by demonstrating that the respondent firm has a certain percentage of the market (sections 7(a) and (b)) or that it has market power (section 7(b) in the alternative and section 7(c)). Market power is defined in the Act as:

3 See Old Mutual's answering papers to Videovision's application for further and better discovery - affidavit of Ian Watt paragraph 20

> *"the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers."*

It is not clear to me how the evidence sought here will establish either. Mere mouthing that discovery is required to establish proof of dominance is not a licence to embark on a wide- ranging, speculative demand for the respondent's documents. Even if one assumes that for the benefit of Videovision that they seek evidence of Old Mutual's power in this market by obtaining evidence of its "ability to raise prices or to behave appreciably differently to its competitors", there is insufficient motivation as to why this documentation would be pertinent to achieve that[4]. Old Mutual points out that it has already discovered documents that are pertinent to the issues of its marketing strategy, screen capacities and locations, including spreadsheets reflecting cinema attendances (item 447) an analytical report on demographics and market share (item 264), a table of shopping centres in Durban and surrounding areas with cinemas (item 256) the capacities of all Ster-Kinekor's cinemas (item 230) and Old Mutual's marketing strategy (item 198).

The onus is on the party seeking to go behind the discovery affidavit to establish the basis for relevance.[5] In this case in the face of Old Mutual's denial of the documents relevance, we have from Videovision a generalised assertion which then forms the basis for the demand for a vaguely described and seemingly boundless class of documents.

Whist it may be trite that an applicant in discovery proceedings can compel the discovery of a genus of documents there are limits to which an applicant may go. As Joffe J observed in the Swissborough case:[6]

> *"Although inspection may be obtained of documents described as a genus, the description of the documents in the present application is so wide and inclusive that it would not be possible to determine objectively what is or is not included therein."*

This aptly describes the request made for discovery under this heading. I am accordingly not satisfied that a basis to have this class of documents discovered as it is presently formulated and motivated has been made.

The request for this item of discovery is denied.

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4 See definition of *market power* in the Act.
5 See Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others 1999(2) SA 279 @ 320 E – G.
6 See Swissborough supra @ 326 C-D

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3. **<u>Source documents in respect of</u> –**

    a) **Item 197 of Ian Watt's discovery affidavit (Item 15 of Annexure "A" of Robert Legh's affidavit)- Source documents/research used in the preparation of the document entitled "Old Mutual Properties, Detailed Report" with special reference, but not limited to the proposed cinema complexes.**
    b) **Item 198 Ian Watt's discovery affidavit (Item 16 of Annexure "A" of Robert Legh's affidavit)- Source documents/research used in the preparation of the document entitled "Gateway Marketing Strategy" with special reference, but not limited to the proposed cinema complexes.**
    c) **Item 264 Ian Watt's discovery affidavit (Item 17 of Annexure "A" of Robert Legh's affidavit)- Source documents/research used in the preparation of the document entitled "Gateway Analytical Report" with special reference, but not limited to the proposed cinema complexes.**

4. **<u>Old Mutual documentation or research that formed the basis of the leasing policy and tenant mix strategy of the Gateway Shopping Mall, including, but not limited to cinemas and other entertainment-related tenants</u>. (Item 18 of Annexure "A" of Robert Legh's affidavit)**

As Videovision did the motivation for the discovery of these four source documents thematically I will adopt the same approach. Videovision argue that Old Mutual has discovered certain documents items 197, 198, and 264, but not the source material from which the documents are constituted. In response to Old Mutual's contention that no basis has been laid for their discovery, Videovision argues that it is entitled to the information itself in order to test the process of "distillation" and "encapsulation". In argument at the hearing counsel for Videovision likened the request for source material to cases where the working papers for an audit opinion or a medical opinion are requested to supply the foundational documents on which they based their conclusions in order to test their veracity.

Yet it is not suggested why the documents already discovered constitute opinions

on Old Mutual's alleged market power which needs to be tested. There is no attempt to peruse these documents, all of which are wide ranging in terms of the issues they cover, to identify information relevant to Old Mutual's market power that express an opinion whose foundations can or indeed need to be tested. It is difficult on an admittedly superficial examination to see any. It is easy however to see how this sweeping claim could lead to the requirement to discover the most peripheral of documents unconnected and unrelated to this dispute. The same point can be made in respect of the documents referred to in item 18 in Schedule A of Legh's affidavit which as I understand Videovision is again sought as source documentation to distil and evaluate the other documents that were discovered. (See par. 10 in Legh's replying affidavit, dated 21 June 2002, where he deals with item 18 together with the other four 'source' documents.) Even if it was intended as a self-standing request it still suffers from being overbroad.

Absent a more focussed and better motivated request I am not persuaded that the complaint is entitled to this class of material. Indeed it is not even certain that these further documents exist. I agree with the respondent that the request is so sweeping that it cannot be accepted as reasonable.
The request for discovery of these items is denied.

5. **<u>All Ster-Kinekor documents relating to marketing and market research in respect of its cinemas in KwaZulu Natal</u> ---- (item 14 of Annexure "C" of Robert Legh's affidavit of 22 May 2002.)**

Videovision alleges that this item is relevant because it relates to the dominance of both Old Mutual in the market for the provision of suitable space to exhibit movies in the KwaZulu Natal region and the dominance of Ster-Kinekor in the market for the exhibition of movies in that region. This request is made of Ster-Kinekor who resist it and echoing the approach of Old Mutual accuse Videovision of embarking on a fishing trip saying the documents are unconnected to the reasons for which they are sought. During argument counsel for Ster-Kinekor pointed out that the request is confined to documentation concerning the KwaZuluNatal market whilst in its papers Videovision has made out a case for a South African market. In its replying affidavit Videovision does not take the matter any further beyond refuting the allegation that the request amounts to a fishing expedition.

Ster-Kinekor goes further to assert that the documents *" to the extent that they exist, are entirely irrelevant to the relief (if any) against Ster-Kinekor."*

I cannot agree with this latter contention. Ster-Kinekor has an interest in the relief sought in respect of section 5 for which Videovision seeks an order to void the

lease between Old Mutual and Ster-Kinekor in respect of the Gateway Cinema complex. One of the allegations made by Videovision in respect of its section 5 claim is that the lease entrenches Ster-Kinekor's dominance of the relevant market

> " on whatever geographic basis is determined, because the third respondent is overwhelmingly the biggest owner of screens in SA and the third respondent is the biggest owner of screens in the Durban area. The third respondent is the only owner of screens in the Durban North/ Umhlanga area, at the La Lucia Mall, and its total dominance of this area will be perpetuated through the further award of the cinemas in the Gateway complex." (See founding affidavit of Sudhir Pragjee paragraph 22.3.2)

It is thus relevant to the relief sought against the third respondent as well. It remains to consider whether the marketing information is again wide off the mark in terms of its relevance to the allegations made in the Pragjee's affidavit. In my view they may well be pertinent. Marketing information may well contain information about the firm's perceptions of its own market position and that of its rivals. Although the request is made for a class of documents, it is specific in its nature. It is not clear of course from Dominguez's affidavit if any of these documents are in existence because he has not denied this. Accordingly Videovison is entitled to further and better discovery on this point.

COSTS

As the remainder of this application is still to be heard it would be premature to make an assessment of the respective parties success and failure and accordingly the costs are reserved.

ORDER

Old Mutual and /or Ster-Kinekor must make discovery of the following items subject to any claim for confidentiality:

1. Item 10 – in Annexure "A"– to Legh's affidavit

Ster-Kinekor must make discovery of the following items subject to any claim for confidentiality:

2. Item 14 in Annexure “C” to Legh’s affidavit.

Videovision’s application for further and better discovery in respect of the following items is refused:

3. Items 14, and 15 –18 of Annexure ” A” to Legh’s affidavit.

PART B

Postponement of argument on points in limine

I have also been asked to give reasons for my decision not to grant the request of Old Mutual to have the pre-hearing conference adjourned to allow certain points of law to be argued first, by way of in limine points.[7]

The application was supported by Ster-Kinekor, but was opposed by Avalon and Videovision.

Old Mutual in motivating its request argues that they can be resolved as exceptions i.e. on the basis of assuming the correctness of the complainant’s case and thus there would be no need for any further evidence.

I agree with Old Mutual that I have a discretion in terms of Rule 21(2) of the Tribunal Rules as to whether to set down a point of law to be determined if it is practical to resolve that before proceeding with the pre-hearing conference. That also accords with the past practice of the Tribunal where we have taken such an approach. It is obvious that if a point of law can be argued on the papers, that if decided in the applicants favour would obviate the necessity to go to trial on the issue or part of the trial, that it should be resolved upfront. The question for me to decide is whether Old Mutual has made a persuasive case for this approach.

Old Mutual classified its objections in three groups.

Two relate to the respective dominance cases and as they are similar I will deal

7 This is not the first occasion that Old Mutual has sought to have us determine certain initial legal points. At the previous pre-hearing on the 8 April I refused an application which raised similar although not identical concerns. Although counsel for Videovision considered that the Tribunal was functus officio in relation to this application, I have not taken that approach and consider that I have a discretion to consider interlocutory points when it is convenient to do so.

with them together[8].

Avalon's first claim is based on section 8(b) which states that it is *"prohibited for a dominant firm to give a competitor access to an essential facility when it is economically feasible to do so."* Old Mutual contends that according to Avalon's papers it is dominant in the market for the letting of retail shopping. Avalon, however, competes in the market known as the day and date cinema exhibition market. There is no allegation that Old Mutual competes in this market. For this reason Avalon have relied on the allegation that Old Mutual has effectively made itself part of one economic unit with Ster-Kinekor in relation to the operation and occupation of cinema premises in prestigious shopping centres developed by it.

According to Old Mutual what Avalon seek to argue is that they constitute one firm by virtue of the alleged closeness of their relationship. For the purpose of determining what a dominant firm means we must have regard to the definition of *'firm'* in the Act, which states *"a firm includes a person, partnership or trust."* However say Old Mutual in terms of this definition separate juristic persons cannot constitute a *'firm'* for the purpose of the Act even if they have some form of vertical relationship or the one has an interest in the other.

Avalon argued that we should not decide this point without hearing further evidence about the relationship between Ster-Kinekor and Old Mutual, which will emerge both through the discovery process and at the trial itself. To argue this point on the papers now would prejudice it in arguing the law point raised, as on a complete record, more may be revealed about the nature of this relationship, which may lead to factual and hence legal conclusions that differ from those than that can be made on the present record. Avalon argues that the initial discovery has already yielded documents that are in point and throw a different light on the relationship between the respondents. I understand Avalon to be arguing that Old Mutual's financial relationship with Ster-Kinekor and thus its role in the exhibition market may be more extensive than the present papers suggest and hence we should be wary of deciding prematurely what constitutes a *firm* for the purpose of the Act. On the definition of *firm* counsel for Avalon makes the point that the definition is an inclusive rather than an exhaustive one.

I am of the view that it would be undesirable to decide a point of law that goes to the exact nature of the economic relationship between two firms without giving the complainant the opportunity to fully develop the record before the point is argued. To do so would be seriously prejudicial to Avalon.

The second and related point of law effects Avalon and Videovision's dominance

8 Avalon's claims relate to alleged infringements by Old Mutual of sections 8(b) and 8(c) , whilst Videovision confine themselves to 8(c).

claim in terms of section 8(c).

Section 8(c) provides that a dominant firm may not engage in exclusionary acts in certain circumstances. An exclusionary act is defined in the Act as *"an act that impedes or prevents a firm entering into, or expanding within, a market".* Old Mutual's argument is that the market referred to must mean the market in which the dominant firm itself operates. Since on both Avalon and Videovision's papers Old Mutual does not operate in the market where the exclusionary act is being perpetrated, viz. the cinema exhibition market, it cannot be dominant in that market and a fortiori it cannot be liable in terms of section 8(c). Avalon again make the same point that they do in relation to 8(b) that the factual record needs to be developed in order to understand Old Mutual 's relationship to the exhibition market before we can decide the point of law. I am again persuaded by this argument that it would be unwise to determine this point of law prematurely.

The final point of law relates to Videovision's claim that the lease in respect of Gateway constitutes a restrictive vertical practice in terms of section 5(1). Old Mutual argues that as the complaint was lodged with the Commission on 24 November 1999 and the lease was concluded only in March 2000, the complaint preceded and therefore could not relate to the agreement. Videovision points out that the concept of agreement for the purposes of section 5(1) is broader than its notion in common law.[9] Again we would need evidence to establish what agreement is contemplated; is it the mere signing of the March lease or a process of events that led up to it. Do we not need to hear evidence of the factual context which led to the complaint preceding the signing of the lease.

However, even if this point of law is good one as against Videovison, I am not persuaded that it can have any practical effect on curtailing proceedings,as Avalon will still be before us with their section 5(1) claim to which there has been no objection.

This remaining section 5(1) claim of Avalon is also in another reason why I am not persuaded that the disposal of the two dominance claims by way of the points in limine would meaningfully curtail proceedings. In a section 5(1) claim by Avalon, which is all we would be left with if all the three points of law were resolved in favour of Old Mutual, there would still need to be evidence that there has been a substantial lessening of competition or 'foreclosure' of the market to use the jargon of competition lawyers. Typically that evidence would relate to the market positions of the respective parties to the agreement – evidence not dissimilar to that which would be led in a dominance case. I am thus not persuaded of the practicality of Old Mutual 's proposal and indeed mindful of the

9 Agreement is defined term in the Act which*".. includes a contract, arrangement or understanding, whether or not legally enforceable."*

prejudice it may give to the complainants.

Counsel for Videovision cautions against us deciding a novel law point by way of exception at this early stage of our jurisprudence. I agree with this approach and indeed it informed our approach in the Botash matter where although we heard certain argument on exceptions we decided not to rule upon them at that stage. [10]

The application for the pre-trial hearing to be postponed in order to set down the first and second respondents points of law for determination is refused. The costs of the application are reserved for later argument.

N. Manoim **Date 8July 02**
Presiding Member

10 See Competition Commission and others v Ansac and another 49/CR/Apr00 decision dated 27 April 2001.