COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No. 100/CR/Dec00

In the matter between:

The Competition Commission	**Complainant**
and	
South African Forestry Company Limited	**First Respondent**
York Timbers Limited	**Second Respondent**
CJ Rance (Pty) Limited	**Third Respondent**

Reasons

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1. In this matter the Commission and the first respondent, who we shall refer to as Safcol, have reached agreement on the terms of a proposed consent order. The Commission on 29 August 2001 applied to have the agreement made a consent order in terms of section 49D of the Competition Act.

2. When the Commission first brought the application on 29 August 2001 the second and third respondents, who we shall refer to as York and Rance respectively, opposed the granting of the application and sought leave to file papers in opposition. We ruled that they were entitled to do so on 06 September 2001.

3. The respondents all filed lengthy answering papers, which dealt not only with the procedural issues, but also engaged the merits of the dispute. The Commission filed papers in reply.

4. At a pre-hearing conference held on the 24 April 2002 we directed that the parties argue a point in limine. We formulated the issue as follows:

> *"whether, assuming that a prohibited practice has occurred, it is competent for the consent order in its current form to be granted if*

the other parties to the contractual clauses, which the applicant seeks to have voided, have not consented thereto"

5. The Commission and the respondents all filed heads of argument on this point and we heard argument on 19 June 2002. We ruled that it was not competent for us to grant the consent order in its current form and accordingly dismissed the application. We set out below our reasons for this decision.

HISTORY OF THE CASE

6. In December 1999, Mondi Limited lodged a complaint of price discrimination against Safcol with the Commission. On 18 December 2000 the Commission instituted a complaint referral against Safcol in terms of section 9 of the Act alleging that certain provisions in the contracts it had with York and Rance constituted price discrimination by a dominant firm. As part of its relief the Commission sought to void these (certain) provisions of these agreements. As York and Rance were not cited as respondents the Tribunal at a pre-hearing conference held on 12 March 2001, gave the following directions:

    1. *"that York Timbers Limited is granted leave to intervene as a respondent in these proceedings in terms of Tribunal Rule 46(2);*

    2. *the Tribunal hereby condones the non-compliance with Tribunal Rule 46 by York Timbers Limited*

    3. *the Commission is granted leave to amend the terms of its referral in this matter and to join as respondents any party whose rights may be affected by the relief sought in these proceedings; the amended complaint referral must be filed with the Tribunal and served on all the respondents no later than 23 March 2001. If the Commission does not wish to amend the terms of the complaint referral it should give notice of its decision not to amend to the Tribunal and the respondents by no later than 23 March 2001;*

    4. *York Timbers Limited and any other additional respondents that may be joined to these proceedings must file their answering affidavit within 20 business days after receiving the complaint referral contemplated in 3 above;*

5. *SAFCOL is entitled to file an additional answering affidavit consequent upon the amended complaint referral, provided it does so within 20 business days after receiving the amended complaint referral*

6. *the Commission may file a replying affidavit within 15 business days thereafter ; and*

7. *there is no order as to costs."*

7. Thereafter the Commission amended its papers and cited York and Rance as second and third respondents, respectively.

8. On 19 November 2001 the Commission entered into a consent order agreement with Safcol; this consent order agreement was filed with the Tribunal for approval on 12 December 2001. The consent order agreement was based on an admission by Safcol that it had contravened section 5(1) of the Act. Note not section 9 which was the basis of the initial complaint referral. In the consent agreement Safcol admits that various clauses in its contracts with York and Rance amount to vertical restraints and consents to them being declared void in terms of section 58(1)(a)(vi) of the Act.[1] York and Rance have filed papers opposing the granting of the consent order.

9. For the purpose of our decision it is not necessary for us to examine the content of these clauses, which are similar in both agreements – it suffices to say that they relate to prices, arbitration of price revisions and the security of tenure of the buyers.

10. In their papers opposing the consent order, York and Rance *inter alia* deny that the impugned clauses contravene section 5(1) of the Act and in the alternative that if they do, they can be justified on the grounds that they can prove that they can prove technological, efficiency or other pro-competitive gains resulting from the agreement that outweighs the anti-competitive effect.

1 They are clauses 3.2 and 4 of each of the long-term contracts with York and clauses 3.2, 3.3, and 4 of each of the long-term contracts with Rance. Section 58(1)(a)(vi) provides that the Tribunal *"may make an appropriate order in relation to a prohibitive practice, including ..declaring the whole or part of any agreement void."*

NATURE OF THE RELIEF SOUGHT IN THE ORDER

11. If the consent order is granted it will have the effect of vitiating clauses in the agreements which York and Rance consider vital to their commercial interests. They argue that because they have an interest in the validity of these clauses it is not competent to grant a consent order that voids them without them (i.e. York and Rance) being heard.

12. Both the Commission and Safcol have argued that it is competent for us to grant the consent order although for different reasons. The Commission argues that York and Rance are not respondents within the meaning of the Act. In terms of the Act a firm is only a respondent if "*it is a firm against whom a restrictive practice is initiated in terms of the Act."*

13. As the restrictive practice was initiated against Safcol and not York and Rance, they are not respondents. Their status is that of intervenors. That being the case the Commission is entitled to enter into a consent order with the true respondent, namely, Safcol, and to apply to have it confirmed as an order by the Tribunal without the necessity of the consent of York and Rance who are not respondents for the purposes of the Act.

14. This approach by the Commission overlooks the fact that what the consent agreement purports to do is to nullify contractual clauses without the consent or hearing parties to those contracts. We take with counsel for Rance that it does not matter exactly what their formal status is. What matters is that they have an interest in the outcome of the consent agreement and accordingly absent their consent are entitled to be heard.

15. It is inconceivable that where the relief sought entails the voiding of a contract that we could grant relief without all the contracting parties being heard. That violates any notion of natural justice or fairness.[2] The relief would mean that a party could have its contract set aside as unlawful without it being given the opportunity to be heard to argue the contrary. This approach is not only unfair but also open to abuse. It is especially dangerous when in a case such as this, where the party to the consent order allegedly has a commercial incentive to escape the consequences of its agreement.

16. York and Rance detect in Safcol's willingness to accede to a consent order, a desire to use the Competition Act to rid itself of a commercially

2 See section 52(2) which mandates the Tribunal to conduct its hearings in accordance with the principles of natural justice.

troubling contractual regime. [3]

17. We make no comment on whether this cynicism is justifiable, but what it illustrates is the danger of not hearing parties to an agreement who have a clear legal interest in the outcome of the consent order. We find no merit in the Commission's argument that we can grant an order in these circumstances without hearing the other parties to the very contractual clauses the consent agreement purports to void.

18. The Commission says that if we do not grant the order in these circumstances it will render the consent order remedy meaningless in future. Counsel for the Commission argued that if a member of a cartel sought to settle with the Commission in circumstances where the remaining members did not, the others would be able to object to the consent order claiming a right to be heard. No one would have the incentive to settle, in cases involving multiple respondents unless all of them had agreed to the order.

19. This is not so. The problem in this case is not the need to gain the consent of all respondents, but the nature of the remedy. This is not a case where Safcol is pleading guilty and agreeing to a fine. It is agreeing to the Tribunal ordering the excision of clauses from its contracts without us hearing from the other parties to those contracts. It is surprising that such an inappropriate use of the consent order procedure was not obvious to the Commission. In the case of a cartel member admitting to a contravention of section 4 of the Act and agreeing to pay a fine the consent of the other members of the alleged cartel would not be required if the remedy does not seek to vitiate the cartel agreement. The remaining members of the alleged cartel would thus be free in any subsequent proceeding to assert the lawfulness of their agreement as the prior consent order had not invalidated it.

20. We now turn to the other leg of the argument, which was advanced by Safcol, and it appears by the Commission in the alternative. That is that we must hear York and Rance but after hearing them the order can still be granted if they have not satisfied us that the agreements do not constitute prohibited practices. Both York and Rance point out that this is an absurdity. Consent order proceedings are by definition not intended to be contested proceedings. For that the normal complaint referral proceedings apply.

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3 The papers refer to an ongoing commercial dispute between the parties in relation to inter alia the validity of these clauses.

21. The briefest examination of the consent order regime illustrates that that cannot be so. In the first place a consent order can be granted even before there has even been a complaint referral. (See Rule 18 of the Rules of the Competition Commission). It is noteworthy that in this case the complaint referral was founded on a case in terms of section 9 of the Act, which deals with price discrimination by a dominant firm. The consent order however is premised on section 5 of the Act, which deals with vertical restrictive practices. Thus York and Rance would have to meet a case in terms of section 5(1) without the benefit of a complaint referral making out a case in terms of this section of the Act.

22. Secondly section 49D of the Act provides that the Tribunal may grant a consent order without hearing any evidence. This suggests that the legislature never contemplated that the consent proceeding could itself become a contested proceeding on the merits. The legislative intent appears quite the contrary.

23. Thirdly, the Act makes it clear that a consent order is not appealable.[4] As counsel for Rance argued, it would be inconceivable that a contested proceeding could be decided upon without the parties having a right of appeal.

24. We reject the argument that the consent agreement in its present form can be resurrected by us allowing some form of contested proceeding. Such a proceeding is not contemplated by the Act and defies logic and common sense.

CONCLUSION

25. It is not competent for us to grant the consent order in its current form. The order requires us to strike down contractual provisions without the consent of all the parties to that contract and without giving them an opportunity to be heard. We accordingly make the following order:

    1. The application for a consent order is dismissed; and
    2. There is no order as to costs.

26 June 2002

4 Section 37(1)(b)(i) which states that The Competition Appeal Court may review any decision of the Competition Tribunal; or consider an appeal arising from the Competition Tribunal in respect of any of its final decisions, other than a consent order.

N.M Manoim **Date**

Concurring: P Maponya; D.H. Lewis