COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 64/CR/Sep02

In the matter between:

FFS Refiners (Pty) Ltd	Complainant
and	
Eskom	First Respondent
EB Cochrane South Africa (Pty) Ltd	Second Respondent
EThekweni Municipality	Third Respondent
National Electricity Regulator	Fourth Respondent

DECISION ON EXCEPTION APPLICATION

In this matter we have to consider several exceptions that have been taken to the sufficiency of allegations made in a complaint referral.

Factual background

1. This complaint was referred to the Tribunal by the complainant FFS, on 10 September 2002, following a notice of non-referral by the Commission.[1]

2. FFS supplies industrial furnace fuels to customers who utilise this energy source for steam generation. Eskom, the first respondent, whom we shall refer to as Eskom, is a statutory corporation that produces and distributes electricity. One of its customers is EB Steam which supplies steam to customers. FFS alleges that Eskom is supplying electricity to EB Steam at a price that is so low, in comparison to other rates which Eskom charges to other customers, including FFS, that this practice amounts to a contravention of several provisions of the Competition Act viz. sections, 8(c), 8(d) (i), 8(d)(iv), 9(1), and 5(1).

---

1 The certificate of non-referral was issued on 7th August 2002.

3. Eskom has not filed its answering affidavit, but has instead raised a number of exceptions to the complaint referral, which we consider in this decision.

4. We have decided to accept the suggestion that we decide all the exceptions taken together. We will deal with each exception separately.

Approach to exceptions

5. We have previously, in our Botash and Glaxo Welcome decisions indicated our approach to exceptions.[2]

6. We most recently restated this position in AACMED/USAP:

> "That being said this does not mean that a respondent is required to answer to any type of pleading proffered, regardless of its impoverishment of fact or legal averment. Fairness is also a standard that our procedures must meet. Respondents are entitled to understand the case being made out against them. The standard set out in Rule 15 of the Tribunal Rules must be adhered to."[3]

7. In this case we find that that standard has not been met and we have upheld all the exceptions.

Dominance

8. The first and most fundamental exception raised by Eskom is that FFS has failed to properly define Eskom as a dominant firm.

9. Only a dominant firm can contravene sections 8 or 9 of the Act.[4] In order to establish that a firm is dominant it must meet one or more of the requirements set out in section 7 of the Act, which states:

---

2 American Natural Soda Ash Corp CHS Global (Pty) Ltd and the Competition Commission, Botswana Ash (Pty) Ltd et al 49/CR/Apr00; National Association of Pharmaceutical Wholesalers & Others vs Glaxo Wellcome & Others 45/CR/Jul01; AACMED and USAP 04/CR/Jan02

3 AACMED and USAP 04/CR/Jan02

4 This is because section 8 states that, *"It is prohibited for a dominant firm to …".* In section 9(1)the formulation is *" An action by a dominant firm …is prohibited price discrimination.."*

A firm is dominant in a market if –

(a) *it has at least 45% of that market;*

(b) *it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or*

(c) *it has less than 35% of that market, but has market power.*

10. FFS alleges that Eskom is dominant in the energymarket in that it has more than 45% of that market. It relies for this proposition on Eskom's self-stated claim that it supplies 98% of the countries electricityrequirements. It alleges that the energy market consists of four energy sources, oil, coal, gas and electricity and that these sources are substitutes for one another. However it makes no allegations of dominance in the energymarket, the market which FFS identifies as the relevant market and in respect of which FFS relies on an abuse of a dominant position. In other words, in respect of the relevant market it has identified, the energy market, FFS has simply not made the material averments necessary to establish Eskom's dominance therein.

11. As Eskom correctly points out it does not follow that because Eskom is the preponderant supplier of one of four substitute sources that it is necessarily dominant. There is a gap missing in the pleadings to link the preponderance in the segment to dominance in the market.

12. To cure this, counsel for the complainants attempted to construct an argument on the basis that since there are other sources of energy, comprising fuel, oil, coal and gas, these sub-markets should be taken to designate the energy market as a whole. What is described as the energy market incorporates the other energy sources, which are substitutable for one another. We should therefore interpret the energy market as that market where energy is produced by one or the other fuel sources. It is therefore in respect of this broad market that Eskom is dominant. Alternatively, complainant's counsel conceded that in the event of uncertainty, referral to evidence may clarify the market definition.

13. We do not accept this view. It is quite possible that in addition to Eskom, there may be one or other dominant player/s in either of the sub-markets, which would dilute Eskom's position in the broader energy market. The fact that Eskom is manifestly dominant in one of the four legs of their expansive definition does not necessarily make it dominant in the entire energy market. The complainant's inability to correctly align the market in respect of which they allege abuse with that in respect of which they allege dominance creates confusion, not only for the parties who are required to answer the complaint, but also the Tribunal. Moreover, in terms of the framing of section 8 of the Competition Act, parties are required to establish dominance before they can move onto the abuse leg of the provision. This is a necessary prerequisite specified by the language of the section - if there is no dominance, the party cannot be guilty of an abuse of dominance. Therefore, in order to succeed on an abuse of dominance claim, it is essential that the complainants plead dominance in respect of the market in which they allege abuse. This must be alleged in the complaint referral – it would not assist the respondent for this to be clarified only at the hearing or some later stage.

14. Dominance can be established by alleging the respondent firm falls into any of the three categories set out in section 7 or if the complainant is uncertain, to allege more than one as alternatives. Mere repetition of the language of the section is insufficient to afford a respondent some basis for understanding the case against it and how it should answer. What is noticeable about section 7 is that the onus varies depending on the subsection the respondent is alleged to fall into. Since this has a material consequence on the nature of the answer, in particular whether the respondent needs to deny it has market power (7(1)(b)) or whether the complainant, can irrebuttably presume that fact (7(1)(a)) or has the onus to prove it (7(1)(c)), it must be properly set out. [5]

15. In this case the factual allegations made out concerning the respondent 's market share relate to a segment of the market that on the complainant' s version is but a subset of the relevant market. The failure to link the two notions makes the pleading incomplete and hence excipiable.

In respect of a contravention of section 8(d)(iv) – selling goods or services below their marginal or average variable cost:

5 It might be possible for a complainant, relying on section 7(1)(c), who is not certain of the boundaries of the market eg whether the market is for blodgets alone or for widgets as well as blodgets to allege instead that the respondent has market power. Yet even on this approach the complainant would still need to plead the facts that support the allegations of market power and at the very least offer some permutations of a possible market where that power is exercised.

16. The complainant alleges that Eskom is selling electricity to its customer at below marginal or average variable cost. To substantiate this assertion, it relies on a price comparison of prices at which Eskom sells electricity to FFS and a selection of other customers on the one hand, and EB Steam ("EBS"), on the other. In view of the vast difference in price charged to FFS and EBS, the complainant asserts Eskom is undercutting it and therefore selling electricity to its customer at below marginal or average variable cost. In essence the complainant is seeking to make out its claim under this section by way of inference.

17. Eskom argues that in order to sustain a claim under section 8(d)(iv), the complainant must make some reference to the respondent's cost structure, in order to enable an evaluation of whether its prices fall below this cost base. Complainant's counsel pointed out that they requested such information from the respondent and were denied it.

18. While we accept that precise costing information is hard to come by and that this information in most cases is jealously protected by respondent firms, nevertheless, at the very least, the respondent must allege facts that enable us to draw an inference that the respondent is pricing at an abnormally low level. In this referral the complainant has done no more than to show that Eskom prices differently to different customers albeit that the rate varies greatly. Yet there is no allegation that these transactions are even equivalent to one another let alone below marginal or average cost. Indeed on the papers the discrepancy in the rate that Eskom charges two of the complainant's plants, one in Durban and one in Secunda is more marked than the discrepancy between the Secunda plant and EBS.

19. It is not an offence under the Act merely to undercut one's competitor, no matter how stark the discrepancy in prices. Price competition is after all the essence of healthy competition.

20. An allegation that a respondent has contravened section 8 (d)(iv) may be made out by way of inference as opposed to direct allegations that the respondent costs are below marginal or average variable cost. But the inference must be founded on some reasonable factual basis in the pleadings and not amount to mere speculation.

21. The present complaint referral falls short of that standard in this respect and hence this exception is upheld.

Price Discrimination Section 9(1)

22. Eskom complains that a mere price comparison between those prices charged by Eskom to FFS and EBS separately do not ground a case for price discrimination. We agree with this view. The wording of the act sets out specifically the requirements to substantiate an allegation of price discrimination. These are:

> *An action by a dominant firm, as the seller of goods or services is prohibited price discrimination, if –*
>
> *a. it is likely to have the effect of substantially preventing or lessening competition;*
>
> *b. it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and*
>
> *it involves discriminating between those purchasers in terms of –*
>
> *i. the price charged for the goods or services;*
> *ii. any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services;*
> *iii. the provision of services in respect of the goods or services; or*
> *iv. payment for services provided in respect of the goods or services.*

23. FFS has not alleged that the transactions are equivalent, nor that there is an substantial lessening of competition occasioned as a result of such alleged price discrimination. The exception is upheld.

Vertical relationship – section 5(1)

24. The complainant alleges, without stating anything further that the same facts alleged in terms of section 8(d)(iv), also in the alternative give rise to a contravention of section 5(1). Eskom complains that there are no material allegations made as to why the prices charged by Eskom to EBS have the effect of "*substantially preventing or lessening competition in the market'* the essential element of a section 5 claim. Again, we endorse this view and uphold this exception.

Exclusion of competitor – section 8(c)

25. Here too, the complainant alleges that the same facts alleged in term of section 8(d)(iv) give rise to a contravention of section 8(c). Eskom alleges that insofar as the complainant has merely reproduced the language of the section, no substantiating allegations are made in respect of this section of the Act. We can see how it would be difficult for a respondent to plead in response to a broad assertion with no substantiating factual allegations.

26. Since the complainant relies on the same set of facts to found this allegation, we assume that the generalised exclusionary act relied upon is a form of predatory conduct that differs in specie from section 8(d)(iv), the statutory form for predatory pricing. In the Nationwide case we considered that section 8(d)(iv) may not be exhaustive of the forms of predatory conduct that the Act proscribes and that predation may still be actionable under section 8(c).[6]

> *"On the other hand the complainant is not bound to follow the prescribed cost formula suggested in 8(d)(iv). In other words if a complainant, relying on section 8(c), can show that a respondents costs are below some other appropriate measure of costs not mentioned in the section, it may prevail provided it adduces additional evidence of predation beyond mere evidence of costs."*

27. Yet as counsel for the respondent rightly argued, some flesh needs to be placed on such an allegation, under 8(c) - it is not self- evident.[7] In the referral no further allegations are made to found the complaint under section 8(c) and accordingly the exception here too is well founded.

Inducing a customer not to deal with the Complainant – section 8(d)(i)

28. Again, the complainant alleges that the same facts alleged in term of section 8(d)(iv) give rise to a contravention of section 8(d)(i). Eskom maintains that the supply of cheap electricity to EBS does not constitute an inducement in terms of this section. We accept this view. The section requires a deliberate act on behalf of the respondents, to induce customers not to deal with a competitor. There may well be reasons other than inducement for FFS' clients electing to deal with EBS over the complainant. More substantiation is required in this regard.

6 Nationwide Airlines (Pty) Ltd and SAA (Pty) Ltd – 92/IR/Oct00

7 Counsel for the respondents conceded that even if this is correct, complainants would still need to show an element of intention to eliminate competitors from the market and to recoup its losses.

Conclusion and Order

We accordingly uphold all the exceptions.

The Complainant is given 20 days from the date of this decision to cure the defects in the complaint referral.

Costs

The first respondent is awarded costs of this application including costs occasioned by the employment of two legal representatives.

21 February 2003

_____

N. Manoim Date

Concurring: M. Holden; P Maponya

For the parties:	D. Gordon SC, instructed by Adams & Adams Attorneys (Complainant)

D. Unterhalter SC, instructed by Deneys Reitz Attorneys (Respondents)