



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CR209Feb17/DSC154Aug18

In the application for further particulars:

TOURVEST HOLDINGS (PTY) LTD

Applicant

and

COMPETITION COMMISSION

Respondent

Case No.: CR209Feb17/DSC152Aug18

In the application for further particulars:

TRIGON TRAVEL (PTY) LTD

Applicant

and

COMPETITION COMMISSION

Respondent

Case No: CR209Feb17

In re:

the complaint referral between:

COMPETITION COMMISSION

Applicant

and

TOURVEST HOLDINGS (PTY) LTD

First Respondent

TRIGON TRAVEL (PTY) LTD

Second Respondent

Panel	: Norman Manoim (Presiding Member)
	: Andreas Wessels (Tribunal Member)
	: Imraan Valodia (Tribunal Member)
Heard on	: 28 September 2018
Order issued on	: 01 October 2018
Reasons issued on	: 29 October 2018

Reasons for Decision

Introduction

- [1] This matter concerns two interlocutory applications filed by Tourvest Holdings (Pty) Ltd (Tourvest) and Trigon Travel (Pty) Ltd (Trigon) on 08 August 2018 in which they requested further particulars in relation to the Competition Commission's (Commission) complaint referral and its supplementary affidavit to the referral.
- [2] To avoid confusion since Tourvest and Trigon are respondents in the main matter we will continue to refer to them collectively in this matter as the respondents even though they are in this interlocutory matter technically the applicants.
- [3] In the interest of time and to not delay the matter any further, we heard both applications on 28 September 2018 and issued our orders on 01 October 2018, dismissing both applications. We attach the orders to these reasons for convenience. Before we set out our reasons for the dismissals, a brief background to these applications is required.

Background

- [4] On 14 February 2017, the Commission referred a complaint to the Tribunal against the respondents wherein it was alleged that the respondents, whom are in a horizontal relationship, entered into an agreement or engaged in a concerted practice to fix prices and tender collusively when bidding for a tender (B4/2015) for the supply of certain administrative and management services in respect of domestic flight tickets and accommodation for members of Parliament. The Commission further alleged that the respondents' bids contained various similarities such as an identical Broad-Based Black Economic Empowerment (B-BBEE) level 2 contribution and a procurement recognition level of 125%; both the respondents' bids were submitted on 14 May 2015; both bids contained an identical single bundle transaction fee and that respondents are affiliated through one entity – the Travel Assignment Group (TAG Group). The TAG Group owns Trigon and is a franchisee of Tourvest.¹ Accordingly, the alleged conduct amounts to a violation of section 4(1)(b)(i) and (iii) of the Competition Act 89 of 1998 ("the Act") and the

¹ Commission's complaint referral para 13-19, TB pg. 39

Commission seeks an administrative penalty of 10% of each respondent's annual turnover.

- [5] The respondents were of view that the Commission's referral was defective in that it failed to disclose a cause of action and that it was vague and embarrassing. As a result, the respondents filed their first exception applications (first round of exceptions). The Commission argued that in its complaint referral it had made sufficient allegations from which an inference could be drawn, following questions put before it by the Tribunal as to whether its investigation had yielded more information. Thereafter, the Commission indicated it had more information in its possession and could elaborate on the points of exception raised by the respondents. On 12 June 2017 the Tribunal decided not to dismiss the referral but granted the Commission an opportunity to file a supplementary affidavit to amend its complaint referral pursuant to the order.²
- [6] A central issue in upholding the first round of exceptions was the question of whether the Commission had alleged all the facts on which it sought to draw an inference that the respondents had engaged in an agreement to fix prices and/or tender collusively. The direction given by the Tribunal required the Commission, *inter alia*, to clarify this issue.
- [7] On 05 July 2017 the Commission duly filed its supplementary affidavit. It now confirmed its case was based on inference drawn from certain facts it alleged were common to both bids, viz. price, BEE status, the date of submission of the bids, Tourvest's incumbency advantage, and a common relationship with a subsidiary of Tourvest.
- [8] Displeased with the sufficiency of the elaborations contained in the Commission's supplementary affidavit, the respondents filed further exception applications (second round of exceptions), arguing that the supplementary affidavit failed to remedy the shortcomings of the complaint referral and did not comply with the Tribunal's order. On 10 January 2018 the Tribunal dismissed the exceptions ruling that it was clear that the Commission's case is based on inference and the

² *Tourvest Holdings (Pty) Ltd and Trigon Travel (Pty) Ltd v Competition Commission* (CR209Feb17/EXC236Mar17, CR209Feb17/EXC055May17).

allegations contained in the supplementary affidavit had been sufficiently established to make out a case based on inference. Tourvest and Trigon were ordered to file their answering affidavits.³

- [9] Subsequently both respondents filed their answering affidavits on 14 February 2018.

Applications: request for further particulars

- [10] After having filed answering affidavits the respondents then both filed applications for further particulars. They justified this step for seemingly two reasons; to better understand the case against them and to enable them to prepare for trial. The main relief sought was an order that the Commission provide these particulars. However, the alternative prayer was framed in the following terms:

*"In the event that the Commission fails to comply with paragraph 1 above (either by providing the particularity sought on time or in sufficient detail), Tourvest is granted leave to approach the Competition Tribunal on these papers, duly supplemented, for an order dismissing the Complaint Referral under CT case number CR209Feb2017 / CC case number 2015Nov0653"*⁴

- [11] On 27 July 2018, the Commission, in response to these applications wrote to the respondents' legal representatives. In its e-mail, the Commission stated it was of the understanding that the particularity the respondents sought were in relation to issues the Tribunal had already resolved in both exception hearings. The Commission was of the view that should it answer to these applications, it essentially would be repeating itself. Based on this, the Commission declined to furnish further particulars to the respondents. In response to this Tourvest argued that the Commission's refusal to file further particulars was prejudicial towards them, more so as the Commission's case is based on inference. In the same vein, Trigon contended that the particularity sought was not specifically addressed by

³ *Tourvest Holdings (Pty) Ltd and Trigon Travel (Pty) Ltd v Competition Commission* (CR209Feb17/EXC134Aug17, CR209Feb17/EXC132Aug17).

⁴ Tourvest's Notice of Motion (NoM) para 2 - Trial bundle (TB) page (pg.) 2. Trigon's alternative prayer was framed in similar terms: "Directing that, should the applicant fail to comply timeously or sufficiently with the above order, the applicant's complaint referral in the main matter, in so far as it relates to the second respondent, will be deemed dismissed." See Trigon NoM para 2, TB pg. 67.

the Commission or otherwise resolved in the exception hearings before the Tribunal.

- [12] We have not gone into detail of what each respondent sought by way of their interrogatories. However, there was a great deal of overlap between the two sets.
- [13] Thematically most questions were addressed to establish if the Commission had more evidence to back its case on inference. (Recall from the earlier discussion the Commission has in the subsequent particulars following the first exception clarified that this is what its case is based on.)
- [14] Others seem to be an attempt to shut the door on a case they may suspect the Commission might bring although it has not made them out currently in the referral. Examples of this type of question are; whether the Commission contends that the respondents misrepresented their B-BBEE status level; how the respondents are likely to benefit regardless of the outcome of the tender through their affiliation with the TAG Group; whether the Commission relies on an agreement reduced to writing and; which individuals were involved in discussing the tender and concluding the infringing agreement.
- [15] In the same vein – they sought to get the Commission to confirm pricing information that the respondents had summarised from discovered documents. These appear to be the type of admissions that are typically sought at a pre-hearing conference prior to the hearing.
- [16] The issue we were called to decide was whether or not the respondents were entitled to obtain these further particulars pursuant to their notices of motion at this stage of proceedings.

The arguments presented

- [17] At the hearing before us, Mr Ngcongo on behalf of Tourvest averred that the foundation of its application is based on two legal considerations, that of fairness and prejudice. The Tribunal as a public body is obligated by the Constitution to act fairly and observe fairness with regards to the parties that appear before it. The

approach taken by the Commission in declining to answer the application on affidavit further compounds and exacerbates the unfairness and prejudice. Further, the facts of this matter are uncontested and if the Commission were to suddenly put up facts before the Tribunal that were not tendered on affidavit, the Commission could not challenge that which has been put up by Tourvest on affidavit.

[18] Mr Marriott on behalf of Trigon argued that it could not see why, given the questions asked in the request for further particulars, the Commission would reasonably refuse its request. All it sought to do was limit the issues in effort to understand the case put against it and ascertain what it is that is required for it to deal with in its witness statements. How this could be prejudicial to the Commission was difficult to see.

[19] The Commission argued that the respondents were not entitled to any further benefit in terms of what they needed to know in a case based on inference. The applications for further particulars are premature as witness statements are yet to be filed.⁵ At the hearing, Mr Modise on behalf of the Commission argued that the respondents failed to set out why the Tribunal should exercise its discretion to grant further particulars. No case of prejudice had been made.⁶ In addition, the respondents clearly in their answering affidavits show that they understand the Commission's case and that a dismissal of the referral at this stage is unfounded.⁷

Our analysis

[20] There is no provision in the Act or in the Tribunal rules that provides for requests for further particulars. The general procedural guideline is to be found in section 52(2) of the Act which states:

"Subject to subsections (3) and (4), the Competition Tribunal –

- (a) must conduct its hearings in public, as expeditiously as possible, and in accordance with the principles of natural justice; and*
- (b) may conduct its hearings informally or in an inquisitorial manner."*

⁵ Commission's Heads of Argument, pg. 9.

⁶ Transcript (T), pg. 45, line (l) 14.

⁷ T, pg. 46, l 15-16.

[21] In the leading case on procedural rights in Tribunal proceedings the Constitutional Court in *Senwes*⁸ held that:

*“This section [52] gives the Tribunal freedom to adopt any form it considers proper for a particular hearing, which may be formal or informal.”*⁹

[22] Thus, neither the Act nor the case law provide for requests for further particulars after the close of pleadings as a right enjoyed by respondents.¹⁰

[23] But nor is the Tribunal precluded, in appropriate cases, from granting this remedy. But the remedy is a discretionary one where the Tribunal balances the interests of fairness to a respondent with the necessity to hear matters efficiently and expeditiously.

[24] Against this backdrop we now consider our past approach to this issue.

[25] The respondents are correct insofar as they point out that there have been cases in the past where we have ordered further particulars to be provided by the Commission.

[26] Thus, in the *SAA*¹¹ case we did so. However, it is clear from the nature of those particulars that they were fundamental to a proper understanding of that particular case.¹²

[27] However more recently in *Pioneer*¹³ we refused to grant such an application from a respondent in a prohibited practice case. The reasoning was that in Tribunal proceedings, respondents have the benefit of getting a full set of witness statements from the Commission prior to trial. As we put it in that case:

⁸ *Competition Commission of South Africa v Senwes Limited* CCT 61/11 [2012] ZACC 6.

⁹ *Senwes* para 50.

¹⁰ The respondents also argued that provision had been made for requests for further particulars in a timetable they had previously agreed with the Commission. Even if this is so, this prior procedural arrangement between the parties does not entitle them, as of right, to further particulars.

¹¹ *Competition Commission v South African Airways* (Case No: 18/CR/Mar01).

¹² *SAA* para 18-24. This was a dominance case and the particulars ordered *inter alia* related to the question of how the respondent firm's market share was arrived at – sales value or number of tickets sold, whether sales were based on sales through all travel agents or just a representative sample

¹³ *Pioneer Foods (Pty) Ltd v Competition Commission* (Case No: 15/CR/Feb07, 50/CR/May08).

*"Parties would be well advised in the future when the furnishing of witness statements has been ordered prior to hearing, to avoid requests for further particulars for trial, until such statements have been furnished and then only if the statements are so devoid of content that the request is necessary to ensure a fair hearing."*¹⁴

- [28] As the pre-hearing timetable indicates the Commission will be furnishing witness statements in this case. Thus, from a point of trial preparation the respondents will be in possession of the Commission's witness statements and thus have both the documentary and oral evidence to be relied on in this case, not only prior to the commencement of the proceedings, but also before they are required to file their own witness statements since the filing of witness statements will be staggered with the Commission filing first.
- [29] Another argument made was that the particulars were necessary to cure issues of vagueness and ambiguity in the referral. But this appears to be an attempt to re-argue the second exception again. We have already decided when we heard the second exception that the referral was adequate. The respondents as noted have been able to file their answering affidavits.
- [30] The argument based on fairness is thus unconvincing. If anything, if we were to grant the relief we would be placing an unfair burden on the Commission. The Commission will for reasons of efficiency wish to prepare for the case at one time and not piecemeal. That time arises according to the timetable when the Commission prepares its witness statements. It should not be burdened with the obligation to prepare answers to requests for further particulars now, and then later have to prepare witness statements.
- [31] When this was pointed out to the respondents, they argued that it was not guaranteed that the witness statements would provide the details they had requested. But even if they don't there are two answers to this. First, if admissions are sought, this is properly the business of pre-trial management at a pre-hearing for which again the timetable provides. Secondly, in any litigation not all issues are capable of being resolved before a trial and this is why we have them, to test

¹⁴ *Pioneer* para 51.

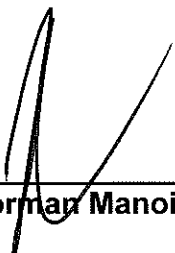
evidence and arguments. Indeed, much of the respondents' questions appear to be directed to asking in a rhetorical sense— is this really all you have? But this amounts to a premature argument about the strength of the Commission's case based on inferences. But once the exceptions had been decided, this debate is a matter for the trial not further particulars.

[32] This is where their alternative prayers become relevant. These are the prayers that seeks to bring an application for dismissal on the same papers if the particulars are not forthcoming or inadequate. This is the kind of process that can only prolong litigation not curtail it, as ancillary disputes develop about the adequacy of answers to questions from the side seeking the particulars, to arguments that the questions should never have been asked by the side seeking to resist answering them.

[33] We are not satisfied that the respondents will be prejudiced or, expressed differently, treated unfairly if further particulars are not furnished to them at this stage. We have thus no reason to depart from our approach enunciated in *Pioneer*.¹⁵

[34] For the reasons set out above the applications of both Tourvest and Tigon are dismissed.

[35] As is our usual practice in litigation involving the Commission and private parties in prohibited practice cases, we make no order as to costs.



Mr Norman Manoim

29 October 2018
Date

Mr Andreas Wessels and Prof. Imraan Valodia concurring.

Tribunal Case Manager

: Ndumiso Ndlovu.

For Tourvest Holdings (Pty) Ltd

: P Ngcongco instructed by CDH.

For Trigon Travel (Pty) Ltd

: G Marriott instructed by Nortons Inc.

¹⁵ See *Pioneer* case op cit.

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AW Wessels (Tribunal Member)
I Valodia (Tribunal Member)
Heard on : 28 September 2018
Decided on : 01 October 2018

ORDER: APPLICATION FOR FURTHER PARTICULARS

KINDLY TAKE NOTICE that having heard the parties in the above matter, the Competition Tribunal orders as follows:

1. The applicant's application for further particulars is dismissed.
2. There is no order as to costs.



Presiding Member
Mr Norman Manoim

01 October 2018
Date

Concurring: Mr Andreas Wessels and Prof. Imraan Valodia

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