THE COMPETITION COMMISSION OF SOUTH AFRICA

Case No: 11/CR/Febr04

In the matter between:

The Competition Commission	**Applicant**
And	
Telkom SA Ltd	**Respondent**

Panel:	**N Manoim (Presiding Member)**
	Y Carrim (Tribunal Member)
	T Madima (Tribunal Member)
Heard on:	**21 April 2011**
Order Issued on:	**4 May 2011**
Reasons Issued:	**23 June 2011**

Reasons for Decision

Introduction

[1] In this application the Commission sought to amend its pleadings for the second time. The first category of amendments relate to the range of products and services which are the subject of the Commission's complaint,

the second category involved allegations that the Commission relies on section 8(c) in the alternative to sections 8(a) and 9 in respect of the same conduct and the third to make certain additional allegations in relation to the excessive pricing complaint relied on under section 8(a) of the Act.

[2] Initially Telkom opposed the application in its entirety. However at the hearing of the matter on 21 April 2011 Telkom dropped its opposition to the first category of amendments in return for certain amendments and commitments provided by the Commission. Accordingly we issued an order as per clause 1 of Annexure A granting the Commission leave to clarify the range of VANS and services/products that compete with VANS and to clarify the VPN solutions referred to in the founding affidavit and to limit the complaint period to the end of 2004. Hence there is no need for us to deal with this category of amendments any further.

[3] Telkom persisted with its objections to the other two categories of amendments. After hearing both parties we dismissed the Commission's application in respect of both. We did not give reasons at the time we made our order. We do so now.

[4] We find that when a party seeks to amend its affidavits it must justify its reasons for doing so. We now examine why we consider the Commission has not sufficiently justified the amendments it now seeks.

Background

[5] This matter has had an extremely long history. On 24 February 2004 the Commission referred its complaint to the Tribunal in which it alleged that Telkom had engaged in anti-competitive conduct in relation to its downstream VANS competitors in that it had charged excessive prices,[1] engaged in price discrimination[2] and had refused to peer.[3] Telkom challenged the referral on jurisdictional grounds. The matter was embroiled in litigation for the next five

[1] Section 8(a)
[2] Section 9(1)
[3] Section 8(c)

years until the jurisdictional point was rejected by the Supreme Court of Appeal on 27 November 2009.

[6] The matter then proceeded in our forum. Telkom finally filed its answering affidavit on 12 April 2010 and the Commission its replying affidavit on 22 June 2010. In its answering affidavit Telkom observed that the Commission's excessive pricing allegations did not comport to the approach set out by the CAC in *Mittal*.[4] The Commission in its reply had asserted that it was unnecessary for it to so amend and that it was confident that it could prove its excessive pricing case as pleaded.

[7] On 27 September 2010 the Commission filed an application to amend its founding affidavit to introduce a margin squeeze case in the 2004 referral ("the first amendment"). The Tribunal dismissed that application on 14 December 2010 for lack of sufficient particularity but directed the Commission in its reasons, which were released on 17 January 2011, on how to rectify the objections against the amendment.[5] The Commission never revived this amendment.

[8] In the course of pre-trial preparations the Commission sought discovery of Telkom's underlying costs in relation to the excessive price case. Telkom had refused this on the basis that the Commission in its pleadings had not made necessary averments to justify this information. At a hearing during January 2011 regarding access to confidential documents it became clear that the Commission had sought this information on the basis that Telkom had alleged differential costs as a justification for the difference in its prices. At that hearing Telkom indicated that it might on further consideration drop its defence.

[9] On 9 February 2011, Telkom indicated that it would no longer rely on differences in underlying costs in relation to the price discrimination/excessive pricing complaint against it as pleaded in its answering affidavit in the main complaint.

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[4] *Mittal Steel South Africa Ltd and others v Harmony Gold Mining Company Ltd and others*, Case No: 70/CAC/Apr07 which was released on 29 May 2009

[5] See Tribunal's Reason's Case No 11/CR/Febr04, dated 17 January 2011

[10] On 10 February 2011 the Tribunal, concerned about the impact of any further amendments on the hearing of this matter, requested the Commission to indicate whether it still intended to pursue its amendment application. The Commission responded to the Tribunal's request in the letter dated 15 February 2011 as follows:

> *"At present the Commission has not decided to file an amendment application. This may, however, change depending on developments in the case. Should the Commission decide to file an amendment application (in respect of a margin squeeze case or any aspect of its pleadings), it will notify the Tribunal and Telkom without delay so that, if necessary the hearing dates may be timeously freed up. We realise that this may cause inconvenience to the Tribunal and Telkom. Such inconvenience as may occur is regretted. The Commission has given much thought and consideration to the issue of a possible amendment and the lack of a clear answer at this stage is a consequence largely of lack of clarity as to the defences that Telkom relies upon."*

[11] But at that stage Telkom had already indicated that it no longer relied on the underlying cost defence. More than two months later, on 16 March 2011 the Commission launched this application.

The amendments relating to exclusionary conduct

[12] The Commission wants to insert the words '*and/or 8(c)*' after the words '*section 9*' in par 17.1.1. In par 17.1.1 of its Founding affidavit the Commission alleges that:

> *"Telkom engages in price discrimination and/or excessive pricing in contravention of sections 9 and 8(a) of the Act respectively. There are two aspects to this complaint."*

[13] Telkom alleges that the Commission is attempting to introduce a margin squeeze case by the backdoor. The Commission vehemently denies this and states it is not intending to rely on a margin squeeze. The Commission explanation for this amendment is that it was a matter of dispute between the

parties whether and to what extent the Commission was relying on section 8(c) of the Act, an issue that arose sharply in the first amendment application when the Commission sought to introduce the margin squeeze complaint. According to the Commission it had always been part of its case that the material facts relied on for the excessive pricing and price discrimination complaints also had an exclusionary effect under section 8(c). Moreover, there was no reason in law why the conduct alleged to give rise to excessive pricing and price discrimination could not, even if proved not to satisfy the requirements of these sections, amount to a contravention of section 8(c). It therefore wished to make clear by amending its founding affidavit that it also relies on sec 8(c) in the alternative to section 8(a) and 9 in respect of the same conduct.

[14] However the explanation is not clear. If this 8(c) case was always there and is not something new as contended, then the amendment seems unnecessary. A cursory glance at the relevant provisions of the Commission's founding affidavit and Telkom's answering affidavit confirms the following:

a. In relation to Prayer 1: Contractual Restrictions on Competition, the Commission has alleged a contravention of s8(b) and/or 8(c).[6] Telkom in its answer summarises the Commission's allegation that this conduct contravened s8(b) and/or 8(c) and proceeds to plead its case thereto.[7]

b. In relation to Prayer 2: Refusal to lease VANS licensees, the Commission alleges a contravention of s8(b) and/or 8(c) and/or 8(d)(i). In para 16 of the founding affidavit a case is made out for this allegation. Telkom in its answer again summarises the Commission allegations and then proceeds to plead its case in denial thereof.[8]

c. In relation to Prayer 3: Alleged price discrimination and excessive pricing, we find a similar scenario. The Commission alleges a contravention of s8(a), s8(c) and /or s 9 of the Act.[9] Telkom again

[6] FA para 14 and 15.4.1 &2
[7] AA paras 5.2.1 -5.2.8
[8] AA paras 5.3.1 – 5.3.8
[9] FA para 17

summarises the Commission's allegations and then proceeds to plead thereto.[10] It denies that it contravened section 9 or 8(a). In relation to 8(a) it also observes that the Commission's pleaded case does not support an allegation of excessive pricing as required by the test set out by the CAC in *Mittal.*[11] In relation to the 8(c) allegation Telkom states that "*it must be established that the conduct in question has given rise to anti-competitive effects. Even if it were to be found that Telkom has engaged in an exclusionary act (which is denied), ...this did not give rise to anti-competitive effects...to justify a finding that s8(c) has been contravened*".[12]

d. In relation to prayer 4: Refusal to peer, we find the same approach. The Commission alleges a contravention of s8(b) and/or 8(c)[13] Telkom summarises it and denies that it has contravened these sections.[14]

[15] Hence there can be no doubt from the above quoted paragraphs that the Commission had pleaded an alternative s8(c) case in respect of each alleged contravention and that Telkom itself, as evidenced by its own summary of the Commission's allegations in its answer and pleading a denial thereto, understood this to be the case. In our view the proposed amendment in respect of 8(c) in this application cannot make the matter any clearer and nor can Telkom now distance itself from an allegation it clearly understood to have been made in the pleadings.

The amendments relating to excessive pricing

[16] The Commission argues that its amendment is intended to make certain additional allegations in relation to the excessive pricing complaint under section 8(a) in order to meet the *Mittal* test for excessive pricing to which it did not have access when it initially pleaded the case. When the Commission had filed its replying affidavit in June 2010 it was of the opinion that it could still prove an excessive pricing case against Telkom even though it did not plead

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[10] AA para 5.4.
[11] *Mittal* Supra.
[12] AA para 5.4.9
[13] FA para 18
[14] AA 5.5. and especially 5.5.4 in relation to 8(c).

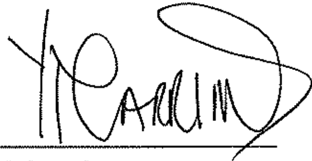
its case in line with the *Mittal* judgment. However, the Commission has taken further advice and has reconsidered its position.

[17] In our view this amendment was not adequately justified by the Commission. It is true that the complaint referral was brought some years ago, prior to *Mittal* being decided but the Commission had already been alerted to the possible defects in its pleadings by Telkom in April 2010. This was after the Competition Appeal Court had handed down its decision in *Mittal*. Despite this, the Commission's response at that time was a steadfast reliance on the case as was pleaded *then*. In its founding affidavit for this application the Commission provides no explanation why it brought this amendment so late in the day and the reason for its change of stance. Only in its Heads of Argument did the Commission explain that the amendment had come about on recent advice given to it, to bring the pleadings in line with the *Mittal* decision. But this was something the Commission had already been advised to consider in *April 2010*. Nor did the Commission seek this amendment in September 2010 when it brought its application to introduce the margin squeeze allegation. In our view the Commission's tardiness in bringing this amendment has not been adequately explained. All the more so given how long this litigation has already taken. Whilst not all the delays can be blamed on the Commission it had a duty to expedite the matter once the Supreme Court of Appeal had found in its favour. This is particularly relevant in this case which involves dynamic technology markets. Many changes have occurred in the telecommunications sector since the lodging of the complaint in 2002, both in respect of the regulatory framework and in relation to market structure. In our view these factors would increase the burden of justification for further delay occasioned by a proposed amendment. By changing its position on the excessive pricing pleading with an explanation of "a recent change of mind" in circumstances when it had already been challenged to do more than a year ago, the Commission has not discharged this burden.

[18] Given our decision above there is no need for us to consider the issue of prejudice to Telkom.

Conclusion

[19] We have for these reasons dismissed the amendment application in respect of s8(c) and s8(a).



Y Carrim

23 June 2011

Date

N Manoim and T Madima concurring.

Tribunal Researcher: Rietsie Badenhorst

For the Applicant: NH Maenetje instructed by Gildenhuys Lessing Malatji

For the Respondent: A Cockrell SC instructed by Mothle Jooma Sabdia

ANNEXURE "A"

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No's: 11/CR/Feb04

In the matter between:

The Competition Commission	Applicant
and	
Telkom SA Ltd	Respondent

Panel	:	N Manoim (Presiding Member), Y Carrim (Tribunal Member), and T Madima (Tribunal Member)
Heard on	:	21 April 2011
Order released:		4 May 2011

Order –Second Amendment Application

After having heard the parties, the Tribunal orders as follows:

1. The Commission is granted leave to amend the founding affidavit in the complaint referral as follows:

   1.1. By inserting, after the words '*VPN Solutions*' in paragraph 3.2.1.2.5, the following words: '*which encompasses a range of technologies,*

namely X.25, frame-based VPN, cell-based VPN, ATM-based VPN, IP-based VPN and MPLS-based VPN solutions' , and

1.2. By inserting the following sentence at the end of paragraph 11.1.2.2: *'VANS and/or competing services are Internet Services provision and VPN services which are provided using a range of technologies, namely X.25, frame-based VPN, cell-based VPN, ATM-based VPN, IP-based VPN and MPLS-based VPN services.'*

1.3. By inserting the following paragraph after 17.1.3: *'the VANS and/or competing services referred to in par 17.1.2 and 17.1.3 above relate to the services stipulated in par 11.2.2 above.'*

2. The Commission is granted leave to file a supplementary founding affidavit to give effect to the amendments set out in par 1 above.

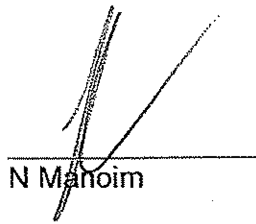
3. The Commission is granted leave to file an amended Notice of Motion to provide for limiting the complaint period to the end of 2004.

4. The respondent is granted leave to file a supplementary answering affidavit in respect of the matters contemplated in paragraphs 2 and 3 above, provided it does so within 20 business days of the filing of the Commission's supplementary affidavit.

5. The Commission's application to introduce certain changes in relation to the complaint of excessive pricing as set out in paragraphs 5(a), 5(b), 7(a), 7(c) and 8 of Annexure A to the Commission's Founding Affidavit in the amendment application is dismissed.

6. The Commission's application to insert section 8(c) as an alternative allegation to sections 8(a) and 9 of the Act in respect of the same conduct as set out in paragraphs 3, 6 and 7(b) of Annexure A to the Commission's Founding Affidavit in the amendment application is dismissed.

7. There is no order as to costs.



N Manoim

Concurring: Y Carrim and T Madima