REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC CASE NO: 158/CAC/Nov17

In the matter between:

SIYAKHUPHUKA INVESTMENT HOLDINGS (PTY) LTD APPELLANT

and

TRANSNET SOC FIRST RESPONDENT

TRANSNET NATIONAL PORTS AUTHORITY SECOND RESPONDENT

J U D G M E N T

Delivered: 03 July 2018

MNGUNI JA:

[1] This appeal has its origin in an unsolicited proposal submitted by the appellant to the second respondent, a division of the first respondent, on 25 January 2008 for the development of a container operation at the Port of Richards Bay. The proposal had been developed following significant research in collaboration with Maersk, a major shipping line, and was aimed at addressing the development block for Zululand, through the creation of container shipping connections to major global

shipping destinations to enable importers, exporters and potential establishers of new industry to be competitive in global markets.

[2] On 30 April 2009, the respondents rejected the proposal, resulting in the appellant filing a complaint with the Ports Regulator of South Africa (the Regulator) in terms of s 47(2)*(a)* and *(c)* of the National Ports Act 12 of 2005 (the NPA).[1] The appellant alleged in that complaint that when the second respondent was integrated as an operating division of the first respondent with the mandate to increase market share, the second respondent, which would have been a competitor of the appellant in respect of the proposal, lost its ability to fairly determine the appellant's application.

[3] Whilst the complaint was still pending before the Regulator, the appellant referred a prohibited practice complaint to the Competition Commission ("the Commission") on 2 April 2014 comprising of two parts.

(a) In the first complaint the appellant alleged that the second respondent operates as a division of the first respondent and there is no delineation between these two respondents. The appellant alleged that since the first respondent's corporate strategy includes protecting base cargo volumes against new entrants and growing its market share, the second respondent is incapable of impartiality in the execution of its duty under the NPA. The appellant contended that this conduct constitutes an abuse of the first respondent's dominant position and violates s 8 of the Competition Act 89 of 1998 ("the Competition Act").

(b) In the second complaint the appellant alleged that after rejecting its proposal, the respondents availed the proposal to the Transnet Port Terminals ("the TPT") which is the appellant's direct competitor. The TPT subsequently implemented the appellant's concept and design despite having previously

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[1] Section 47(2)*(a)* and *(c)* of National Ports Act 12 of 2005 provides:
'A complaint against the Authority may be based on any ground provided for by the Regulator by direction under section 30(3) or on the ground that -
(a) access to ports and port facilities are not provided in a non-discriminatory, fair and transparent manner;
…
(c) Transnet is treated more favourably and that it derives an unfair advantage over other transport companies.'

expressed the view that the Port of Richards Bay terminal was not suitable for the containers. The appellant alleged that this conduct too constitutes an abuse by the first respondent of its dominant position in violation of s 8 of the Competition Act.

[4] On 14 September 2015 the Commission issued a notice of non-referral of the complaint in terms of s 50(2)*(b)* of the Competition Act. Aggrieved by this outcome, the appellant self-referred the complaint to the Competition Tribunal ("the Tribunal") in terms of s 51(1) of the Competition Act on 10 October 2015. The appellant alleged in the referral that the first respondent's rejection of its application effectively amounts to a refusal by a dominant firm to give a competitor access to an essential facility and/or refusal to supply a scarce good to a competitor when it would be economically feasible to do so. The appellant asserted that the second respondent's actions were in violation of s 8*(b)*, *(c)* and *(d)*(i) of the Competition Act.

[5] Between the period of the original complaint and the notice of non-referral the Regulator issued its decision on 15 July 2015. The Regulator concluded that the appellant's proposal submitted in 2008 had become outdated by the time the matter came to it for consideration, that the proposal did not meet all the requirements of a legitimate unsolicited bid as contemplated by s 56(5) of the NPA read with Treasury Practice Note 11 of 2008/2009, and that for the purposes of fairness, transparency, cost effectiveness, equitability and competitiveness in the awarding of the concession, other possible competitors should be given a fair opportunity to offer such service if possible and to present their proposals through a competitive process as envisaged in s 56(5) of the NPA. The Regulator also dismissed the appellant's argument that its intellectual property had been appropriated by the second respondent. However, all was not lost for the appellant as the Regulator, after stating that it is aware of the monopolistic operation of container terminals in South African ports system, held that this is a competition matter which is better dealt with by the Commission.

[6] In response to the complaint filed, the respondents contended that the complaint did not constitute a prohibited practice as set out in Part A of Chapter 2 of the Competition Act. The respondents contended that when the second respondent

performs its duties in terms of the NPA, it does so as the deemed authority and is neither in a horizontal nor vertical relationship with the TPT because both the second respondent and the TPT form part of the same juristic entity. Accordingly, the second respondent and the TPT are not in competition with each other. The respondents contended that even if the second respondent and the TPT could be treated as different firms for the purposes of the Competition Act, it cannot be said that they are in a customer-supplier relationship as contemplated in s 5 of the Competition Act for the following reasons: The second respondent's functions as set out in ss 11 and 12 of the NPA are regulatory and administrative and deal mainly with providing waterside services and to control, regulate and land side services. The second respondent is not empowered to perform any operational functions except as provided for in s 11(4) which only applies in exceptional circumstances. The second respondent has the responsibility of determining the requirements of a port with regard to infrastructure and port services and has the obligation of providing water based services. On the other hand the TPT provides port services and operates certain port facilities until such time as a third party is authorised to carry out same.

[7] According to the respondents, before any person may operate a port facility or terminal or provide port services, it must either conclude an agreement with the second respondent in terms of s 56 of the NPA or be licensed to do so in terms of ss 57 or 65 of the NPA. A person who, prior to the commencement of the NPA (26 November 2006) operated such a facility or rendered such a service, was deemed in terms of s 65(1) to have held such a licence temporarily pending the lodging of an application for a fresh licence. The powers of the second respondent to conclude agreements in terms of s 56 and to grant licences in terms of ss 57 and/or 65 of the NPA are matters of law. The exercise thereof is specifically regulated by the Ports Regulator in terms of ss 30 and 47 of the NPA. They cannot be said to constitute an economic activity as envisaged in s 3 of the Competition Act, which, although not defined, excludes activities not conducted along commercial and competitive lines.

[8] For the reasons stated in paras 6 and 7 above, the respondents contended that the appellant had failed to make out a case of abuse of dominance , in particular of any exclusionary acts in this matter.

[9] Subsequently the appellant filed a supplementary founding affidavit[2] in which it sought to apprise the Tribunal of recent events which allegedly had a direct bearing on the matter. In it, the appellant asserted that four months after the respondents had filed their answering affidavit, the first respondent made public its decision to commence with the development of the base cargo terminal at Richards Bay. It contended that the first respondent's decision demonstrates that there are sufficient actual and potential volumes of base cargo to justify the development of a dedicated container terminal at Richards Bay. There had been no significant change in the base cargo volumes since April 2009 when the respondents refused its proposal. The appellant asserted that this decision to develop the container terminal at Richards Bay was made by a broader first respondent group which included the second respondent and the TPT. It further asserted that its conclusion in this regard is underscored by the fact that the first respondent did not issue a request for proposal for the development of the container terminal but it simply announced that the proposal would go ahead with the TPT as the developer and beneficiary. It concluded by stating that the first respondent's decision to now develop a container terminal at Richards Bay undermines the entire foundation upon which the refusal of its proposal was based.

[10] Whilst the appellant accepted that the second respondent and the TPT constitute a single firm for Competition Law purposes, it contended that the first respondent is a vertically integrated firm. The appellant asserted that the second respondent owns and controls all the land at all South African ports including the Port of Richards Bay, and is exclusively empowered in terms of the NPA to authorise the design, construction, rehabilitation, development, financing, maintaining and operation of the port terminals and port facilities or the provision of services relating thereto,[3] and to grant licences to operate a port service or a port facility. The second respondent is a monopoly provider or supplier of port land and authorisations or licenses to the firms in the downstream market for the provision of port facilities or services. The second respondent is therefore a dominant firm in this market as it is the only entity that can provide port land and authorisations or licences to operate a container terminal at the Port of Richards Bay. The appellant asserted that it is the

[2] The supplementary founding affidavit was deposed to on 6 June 2016.
[3] Section 56 of the NPA.

competitors of the TPT in downstream market for the provision of port facilities and port services.

[11] In their supplementary answering affidavit the respondents raised two points in limine. In the first point, they contended that the issues which the appellant raised in the competition proceedings, in particular those raised in its supplementary founding affidavit, are the same as those issues which the appellant has raised in the review proceedings before the Durban High Court where it seeks to review the Regulator's dismissal of its appeal. They contend that the cause of action before the Tribunal does not amount to a prohibited practice but rather an alleged breach by the second respondent of its obligations in terms of the NPA. They further contend that the appellant's remedy in this regard lies in s 47 of the NPA and that the matter is fundamentally one of public law over which the Tribunal does not have jurisdiction. Consequently, it would be improper for the Tribunal to adjudicate the complaint bearing in mind that the matter was currently pending before the high court.

[12] The second point in limine was allied to the first one and was raised in the alternative in the event of the Tribunal finding that the first point was without substance. The respondents alleged that the claim regarding the subsequent announcement of the development and operation of a container terminal at Richards Bay did not form part of the original complaint submitted in terms of s 49B(2) of the Competition Act which served before the Commission and consequently, the Tribunal did not have jurisdiction to consider such complaint.

[13] On the merits the respondents persisted in their denial that the first respondent is a vertically integrated firm. They continued to contend that the first respondent is a company which has statutory recognised business units, two of which are the second respondent and the TPT. The respondents generally denied the substance of the appellant's complaint.

[14] On 6 April 2017 at the second pre-hearing, the matter served before a single Tribunal member who directed that the two points in limine be determined by a full panel of the Tribunal as an exception. The hearing before the full panel took place on 6 July 2017. On 17 October 2017 the Tribunal upheld the respondents' two points in

limine and dismissed the appellant's complaint in its entirety on the ground that it did not have jurisdiction to adjudicate it.

[15] In upholding the points in limine and dismissing the complaint with no order as to the costs, the Tribunal relied on its decision in *AEC Electronics (Pty) Ltd v Department of Minerals and Energy*[4] and reasoned that when the second respondent considers granting concessions to operate port terminals, it is exercising functions in terms of a statute and was therefore exercising public power over which the Tribunal has no jurisdiction. The Tribunal concluded that the appellant's recourse in relation to this particular point was to approach the high court in order to review the decision of the second respondent.

[16] Undeterred by these failures, the appellant launched this appeal against the dismissal of its complaint contending that the Tribunal misconstrued the nature of its complaint and that this error resulted in the Tribunal upholding the respondents' points in limine. In addition, the appellant contends that even on the Tribunal's own (mis) characterisation of the complaint, the Tribunal ought to have dismissed the exception that the Tribunal did not have jurisdiction to consider the complaint. All these contentions are contested by the respondents. I find it convenient to consider each of these contentions in turn.

[17] An appropriate starting point is to consider whether the Tribunal mischaracterised the appellant's complaint as contended by the appellant's counsel. The primary thrust of the appellant's attack against the Tribunal's decision is that it erred in its approach to jurisdiction and the pleadings, resulting in miscasting the appellant's case on the merits and in the pleadings before it. The appellant's counsel submitted that the assessment of the question whether a court has jurisdiction is determined on the basis of the pleadings and not the substantive merits of the case. In support of this submission he relied on the decision in *Gcaba v Minister of Safety and Security & others.*[5] He argued that the Tribunal erred in concluding that it was entitled to uphold the exception on the basis that the issues raised by the appellant

[4] *AEC Electronics (Pty) Ltd v Department of Minerals and Energy* (48/CR/June 09) [2010] ZACT 12 (8 February 2010).
[5] *Gcaba v Minister of Safety and Security & others* 2010 (1) SA 238 (CC) para 75.

in the competition proceedings are the same as those which the appellant has raised in the review proceedings before the Durban High Court wherein it seeks to review the Regulator's dismissal of its appeal. He submitted that the Tribunal's error in this regard was predicated in the wrong thinking that the two separate claims could not be run concurrently. Relying on the decision in *Makhanya v University of Zululand*,[6] he was astute to point out that 'where a person has two separate claims, each for enforcement of a different right, the position is altogether different, because then both claims will be capable of being pursued, simultaneously or sequentially, either both in one court, or each in one of those courts'. He correctly pointed out that the appellant in this case is in the position of two separate claims, one under competition law and another under public law, and is therefore permitted to pursue them separately in different fora.

[18] To counter these submissions, the respondents' counsel submitted that in determining the issue of jurisdiction, the correct question to ask is whether the Tribunal has the power to enforce a claim arising from an administrative act or the exercise of public power that does not constitute economic activity? He submitted that based on the authorities on which the Tribunal relied on in dismissing the appellant's complaint, the Tribunal clearly does not have such power. In his submission, the only time that the Tribunal will have any power to intervene is after a licence is issued or a concession awarded, as it is only at this stage that economic consequences will follow upon the carrying on of the business authorised by the concession and/or licence. Counsel contended that ,when categorising the decision as either economic activity or public law, one must be astute not to conflate the decision with the motive for taking the decision. In his view, this distinction is important, as it is possible that a functionary empowered by statute to make a decision may be influenced by economic motives when making that decision but that does not automatically make the decision an economic activity subject to the provisions of the Competition Act.

[19] Respondents' counsel submitted that the matter is still a public law issue and that a person wishing to impugn that decision on the grounds that it was motivated

[6] *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) para 27.

by improper economic motives, may do so by bringing a review in the high court in terms of s 6(2)*(e)*(i) and (ii) of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA), or on the grounds of ultra vires, irrationality, or illegality if the decision is held not to be an administrative action. He sought to argue in favour of a procedure that would allow the review proceedings to proceed, and, if during the course of the review proceedings the question of whether the conduct complained of was prohibited in term of the provisions of the Competition Act, then the court hearing the review would be obliged to act in terms of s 65(2) of the Competition Act. In his submission the legislature could never have intended that simply because a dispute is raised which involves conduct prohibited in terms of the Competition Act, the entire dispute must be determined by the Tribunal. He expressed the view that if the Tribunal were to entertain the case and find in favour of the appellant and grant the relief which it seeks, it would be ordering the second respondent to grant a concession to the appellant in terms of s 56 of the NPA without there having been compliance with the requirements of that section including, without limitation, subsection (5) thereof which enjoins the second respondent to follow a procedure that is 'fair, equitable, transparent, competitive and cost effective'. He contended that the ad hoc granting of concessions and/or licences by the Tribunal simply on competition grounds would render the proper integrated development of the South African ports impossible resulting in the second respondent being unable to carry out its functions in terms of s 11 of the NPA.

[20] He further submitted that the powers of the second respondent to conclude agreements in terms of s 56 and grant licences in terms of s 57 and/or 65 of the NPA are matters of law, the exercise of which is specifically subject to oversight by the Regulator in terms of ss 30 and 47 of the NPA and cannot be said to constitute economic activity as envisaged in s 3 of the Competition Act. He pointed out that in *Gcaba*[7] (above) the court found further that the pleadings must be properly interpreted to determine what claim the applicant is actually asserting and which court has the competence to determine such claim and that the mere fact that the complaints were couched as competition issues does not mean that they were in truth competition issues.

[7] *Gcaba v Minister of Safety and Security* above para 75.

[21] It is common cause that in terms of s 56 of the NPA the second respondent has powers to conclude agreements and to grant licences in terms of ss 57 and/or 65 of the NPA. Section 3(1) of the Competition Act provides that the Act applies to all economic activity within, or having an effect within, the Republic.[8] The legislature established the Competition Commission and Tribunal as the primary authority in competition matters and by introducing s 3(1A)*(a)* established that where another regulatory authority has jurisdiction over any area of a matter covered by the Competition Act its jurisdiction would be concurrent with that of the competition authorities. The section provides:

'In so far as *this Act* applies to an industry, or sector of an industry, that is subject to the jurisdiction of another *regulatory authority* which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of *this Act, this Act* must be construed as establishing concurrent jurisdiction in respect of that conduct.'

In the course of argument the respondents' counsel conceded that the legislature established the competition authorities as the primary authority in competition matters and that by introducing s 3(1A)*(a)*, established that where another regulator has jurisdiction over any matter covered by the Act, its jurisdiction would be concurrent with that of the competition authorities. He, however, harked back to s 56(5) of the NPA and contended that any agreement contemplated in subsections (1) or (4) may only be entered into by the second respondent in accordance with a procedure that is fair, equitable, transparent and cost-effective.

[22] In *Competition Commission of SA v Telkom SA Ltd & another* Malan JA said:[9]

'Both the repeal of section 3(1)*(d)* and the introduction of section 3(1A)*(a*) brought about a complete change from the earlier position. They are general provisions intended to regulate the subject-matter comprehensively and intended to establish the general jurisdiction of the competition authorities in all competition matters. The Competition Act applies to all economic activity within or having an effect within South Africa. It provides for wide powers and general remedies more effective than the limited ones given by the Telecommunications Act. There is no room for the implication of exclusive jurisdiction vested in ICASA contended for. The authorising legislative and other provisions Telkom relied upon did not oust the

[8] The exceptions provided in this section are: '*(a)* collective bargaining within the meaning of section 23 of the *Constitution*, and Labour Relations Act, 1995 (Act 66 of 1995); *(b)* a collective agreement, as defined in section 213 of the Labour Relations Act, 1995; and *(c)* and *(d)*…….*(e)* concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose'.

[9] *Competition Commission of SA v Telkom SA Ltd & another* [2010] 2 All SA 433 (SCA) para 35.

jurisdiction of the Commission and the Tribunal but could well give rise to defences to the complaints referred. The competition authorities not only have the required jurisdiction but are also the appropriate authorities to deal with the complaint referred.'

[23] This reasoning commends itself to me as applying equally to the present matter. As I understood the argument advanced on behalf of the appellant, this court is called upon to determine a narrow question without reference to the merits of the dispute, of whether the basis of the claim as foreshadowed and formulated in the complaint involves the Tribunal's competence. In light of this narrow question which this court is required to answer, it seems to me that the argument advanced on behalf of the respondents based on the requirements in ss 56, 57 or 65 of the NPA puts the cart before the horse. In the circumstances the answer to the narrow question is in the affirmative.

[24] This is however not the end of the enquiry. The next step to consider is whether there is any substance in the appellant's contention that the Tribunal mischaracterised its two complaints?

[25] The main thrust of the first complaint as pleaded in the supplementary founding affidavit is the following: The second respondent owns and controls all the land in all South African ports, including the Port of Richards Bay. In terms of the NPA, the second respondent is exclusively empowered to authorise the design, construction, rehabilitation, development, financing, maintaining and operation of port terminals and port facilities or the provision of services relating thereto. The second respondent is the only entity that is authorised to grant licences to operate port facilities and services throughout South Africa.

[26] The second respondent has prevented the appellant, which is a potential competitor in the market to the TPT, from developing a container terminal and providing a container terminal service at the Port of Richards Bay. The refusal by the second respondent to provide access to an essential facility to the appellant has impeded and prevented it from entering into and expanding within a market and constitutes an exclusionary act for purposes of the Competition Act. There was also no technological or efficiency or other pro-competitive gain which arose as a result of

the respondents refusal to accept its proposal. In addition, the first respondent's refusal to grant the appellant's proposal and the second respondent's subsequent entering into an agreement with Maersk Line had the effect of inducing the appellant's customer Maersk not to deal with the appellant. The appellant did not complain that its proposal was not properly considered, which would be a public law complaint, but rather that the proposal was considered in sufficient detail and that the first respondent itself attempted to implement the proposal through the use of coercion and abuse of its dominant position.

[27] The appellant asserted that the first respondent realised that its proposal involving a container operation backed by Maersk, would constitute a significant threat to the respondents' monopoly if implemented. The respondents therefore used their dominant position to prevent this threat or challenge in line with their broader and avowed strategy to protect volumes against new entrants. Shortly after the refusal of the appellant's proposal, the respondents implemented a similar proposal without following a s 56 process and without a licence issued by the second respondent. The appellant asserted that the TPT applied and received approval for the first time for such a licence in March 2016. The appellant asserted that the first respondent's recent decision demonstrates that there are sufficient actual and potential volumes of base cargo to justify the development of a dedicated container terminal at Richards Bay. And that since there have been no significant changes in the base cargo volumes since April 2009, when the first respondent refused the appellant's proposal, its decision to now develop a container terminal in Richards Bay undermines the foundation of the first respondent's refusal to approve its proposal in the first instance and confirms that the decision was an abuse of dominance. The appellant has alleged that the respondents' conduct contravenes ss 5(1), 8*(b), (c)* and *(d)*(i) of the Competition Act.

[28] Appellant's counsel contended that the Tribunal incorrectly characterised the first complaint as a public law complaint, for it said that when the second respondent makes a decision whether or not to grant a concession, it is exercising public power over which the Tribunal has no jurisdiction. He submitted that the Tribunal's reliance on *AEC Electronics* (above) as a basis for refusing to exercise jurisdiction was misplaced because its complaint before the competition authorities was not a public

law complaint, but squarely a competition complaint. He submitted that unlike in *AEC Electronics*, if the appellant had launched its case in the high court on the pleadings filed before the Tribunal, the appellant would fail to make out a case for any administrative relief because the first complaint, when correctly characterised, is squarely a competition law complaint as it is contended that the first respondent abused its position achieved through gaining full strategic control for competitive purposes over the second respondent.

[29] By contrast respondents' counsel submitted that the complaint was couched as a competition issue through reference to terms such as 'abuse of dominance' and 'monopoly' obviously for the purpose of seeking an award from the Tribunal of a concession or licence to operate a container terminal in Richards Bay, in spite of the fact that the power to make this award had been given to the second respondent by the legislature subject only to oversight by the Regulator. He reiterated the first respondent's denial that it was abusing its powers to advantage its business units to the detriment of would be competitors. He described the complaint as an opportunistic attempt by the appellant to secure either a concession or a licence for the rendering of a port service without going through the processes set out in ss 56, 57, and 65 of the NPA which it seeks to do by clothing its complaint as a competition issue when patently it is not.

[30] With regard to the alleged mischaracterisation of the second complaint, the case pleaded by the appellant is the following: The respondents' refusal to accept the appellant's proposal constitutes a refusal to provide the appellant access to an essential facility to its competitor. According to the appellant this is exclusively a competition complaint. The appellant asserted that the first respondent used strong arm tactics and its monopolistic position to contract Maersk Line in calling Richards Bay at the first respondent's underequipped Multi-Purpose Terminal for break bulk cargo at the berths as proposed by the appellant. Pursuant to that, the first respondent concluded a three year port and rail integrated contract with Maersk Line based on the appellant's concept and design. The first respondent however refused to provide the appellant access to the property, a licence or authorisation, which the appellant needs to operate a container terminal.

[31] In terms of s 3(2) of the NPA, the second respondent is required to operate independently of the broader first respondent group. It provides that until such time as the necessary steps are taken for the incorporation of the National Ports Authority of South Africa as a company, the second respondent is to all purposes deemed to be the authority, and must perform the functions of the authority as if it were the authority. In terms of s 11(1) of the NPA, the main functions of the authority are inter alia, to own, manage, control and administer ports to ensure their efficient and economic functioning, and in doing so it must, inter alia, plan, provide, maintain and improve port infrastructures and regulate and control the development of ports in South Africa.[10]

[32] The second respondent is required to carry out these functions without favouring the first respondent in any way. Section 47 of the NPA contemplates that a complaint may be lodged against the second respondent if access to ports and port facilities is not provided in a non-discriminatory, fair and transparent manner[11] or if the first respondent is treated more favourably by the second respondent and that it derives an unfair advantage over other transport companies in its dealings with the second respondent.[12] In order for the second respondent to comply with its duties in its dealings in terms of the NPA, it is required to operate entirely independently of the rest of the first respondent and, must eschew the first respondent's interests insofar as they are inconsistent with the objectives of the NPA or where there are other more effective means available to the second respondent to achieve those objectives.

[33] The appellant asserted that from a competition law perspective, it is arguable that the second respondent is, as a matter of law, pursuant to the provisions of the NPA, an independent entity from the TPT and should be treated as such by the competition authorities. It asserted that should the Tribunal find that the second respondent and the TPT are, as a matter of law, independent firms for the purposes of competition law, then it is clear that they have entered into an agreement (whether by contract, arrangement or understandings), the effect of which was to exclude the

[10] Section 11(1)*(a)* and *(g)* of the NPA.
[11] Section 47(2)*(a)* of the NPA.
[12] Section 47(2)*(c)* of the NPA.

appellant from entering the market for the provision of a container terminal and service at the Port of Richards Bay. According to the appellant, the agreement is clearly evidenced by the fact that its proposal was considered by the executive of the first respondent rather than by the second respondent and by the fact that the TPT has subsequently been given authorisation to develop a container terminal at the port to the exclusion of the appellant and other potential competitors.

[34] The appellant's counsel contended that in exercising the first respondent's competitive strategy as an operating division, all of the second respondent's activities become commercial activities as the second respondent is obliged to serve the first respondent's commercial goals. The award of the business by the first respondent to itself has manifestly led to the reduction in competition for container services at the Port of Richards Bay and the TPT has become the monopoly supplier of these services. He submitted that the dispute before the Tribunal was not about a public entity exercising public powers incorrectly, but was about the first respondent using and abusing the second respondent for its own purposes and competitive advantage, and in doing so, denying competitors such as the appellant access to essential facilities.

[35] The conduct of the respondents complained of concerns the alleged contravention of ss 5(1) and 8*(b)*, *(c)* and *(d)*(i) of the Competition Act. The appellant pertinently alleged the contraventions of these sections in its complaint referral. In its relevant part, s 5(1) provides that 'an *agreement* between parties in a *vertical relationship* is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the *agreement* can prove that any technological, efficiency or other pro-competitive, gain resulting from that *agreement* outweighs that effect'. Section 8 contains prohibition for a dominant firm to (b) refuse to give a competitor access to essential facility when it is economically feasible to do so; (c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive, gain; or (d)(i) requiring or inducing a supplier or customer to not deal with a competitor. An essential facility is defined as 'an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers'. An exclusionary act is

defined as ‘an act that impedes or prevents a firm entering into, or expanding within, a market’. A vertical relationship is defined as ‘the relationship between a firm and its suppliers, its customers, or both’.

[36] As already stated, the Competition Act applies to all economic activity within, or having an effect within the Republic. Under the Competition Act, the complaints of anti-competitive behaviour are investigated by the Commission before they are referred to the Tribunal, irrespective of whether the complaint was initiated by the Commission or was submitted to it by a third party. If the investigation reveals that no prohibited practice or abuse has occurred, the Commission may not refer the complaint to the Tribunal but instead, may issue a notice of non-referral if the complaint was submitted to it by a third party, in which case the complainant may self-refer the complaint to the Tribunal.

[37] The mere referral of a complaint triggers the exercise of the Tribunal’s adjudicative powers and the Tribunal is obliged to conduct a hearing into the matter with the object of determining whether a prohibited practice has indeed occurred. If a prohibited practice is established, then the Tribunal may impose a remedy it deems appropriate, choosing from a number of remedies listed in the Competition Act. In terms of s 27 the functions of the Tribunal include the power to adjudicate any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and, if so, to impose any remedy provided for by the Competition Act. The Tribunal is required to conduct its hearing in public and in accordance with the principles of natural justice. It has powers to summon and interrogate and to order the production of books, documents or items required for the hearing.[13] On conclusion of the hearing it must make an order permitted by the Competition Act and must issue reasons for such order.[14]

[38] I am persuaded that both the first and second complaints, properly construed, fall within the Competition Act and the Tribunal’s exclusive jurisdiction because in each of the complaints the conduct alleged pertains to an abuse of the first

[13] Sections 54*(c)* and 56 of the Competition Act.
[14] Section 52(4) of the Competition Act.

respondent's dominant position and its refusal to grant access to the appellant to an essential facility.

[39] Having carefully considered the appellant's complaint, I am satisfied that it is squarely based on alleged anti-competitive conduct under Chapter 2 of the Competition Act, abuse of dominant position and refusal to provide access to an essential service in violation of s 8 of the Act. To my mind these are matters of competition which are better dealt with by the Competition Commission. In the circumstances I find that the Tribunal erred in its conclusion that it did not have the jurisdiction to adjudicate the appellant's complaint and that the complaint was a public law complaint beyond the jurisdiction of the competition authorities.

[40] What remains to be considered is the question of costs. The general rule is that in the ordinary course costs follow the result. I am unable to find any circumstances which persuade me to depart from this rule.

Order

[41] In the result the following order shall issue:

(a) The appeal is upheld with costs such costs to include costs of two counsel.
(b) The order of the Tribunal of 17 October 2017 is set aside and replaced with the following order:
"**The exception is dismissed with costs**."

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Mnguni JA

Davis JP and Van der Linde AJA concurred

Appearances

Heard:	25 April 2018
Delivered:	03 July 2018
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