CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 90/11
[2012] ZACC 15

In the matter between:

COMPETITION COMMISSION	Applicant
and	
LOUNGEFOAM (PTY) LTD	First Respondent
GOMMAGOMMA (PTY) LTD	Second Respondent
VITAFOAM (PTY) LTD	Third Respondent
STEINHOFF AFRICA HOLDINGS (PTY) LTD	Fourth Respondent
STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD	Fifth Respondent
FELTEX HOLDINGS (PTY) LTD	Sixth Respondent
KAP INTERNATIONAL HOLDINGS (PTY) LTD	Seventh Respondent

Heard on : 7 February 2012

Decided on : 26 June 2012

JUDGMENT

MAYA AJ (Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Nkabinde J, Skweyiya J, van der Westhuizen J and Zondo AJ concurring):

[1] This is an application for leave to appeal directly to this Court against a judgment of the Competition Appeal Court (CAC). The CAC overturned a decision of the Competition Tribunal (Tribunal) granting the application of the Competition Commission (Commission) to amend its complaint referral against the respondents and to join the fourth respondent (Steinhoff Africa) to the complaint as a consequence of one of the amendments. The Commission also requests condonation for its delay in launching this application.

Background

[2] The Commission is an independent regulatory authority established in terms of the Competition Act 89 of 1998 (Act).[1] It is vested with wide-ranging powers aimed at furthering the Act's objective of promoting and maintaining competition within the economic realm.[2] Its various functions include the implementation of measures to

[1] Section 19 provides:

> "(1) There is hereby established a body to be known as the Competition Commission, which—
>
> (a) has jurisdiction throughout the Republic;
>
> (b) is a juristic person; and
>
> (c) must exercise its functions in accordance with this Act.
>
> (2) The Competition Commission consists of the Commissioner and one or more Deputy Commissioners as may be necessary, appointed by the Minister in terms of this Act."

[2] The purpose of the Act is set out in section 2, which reads:

> "The purpose of this Act is to promote and maintain competition in the Republic in order—
>
> (a) to promote the efficiency, adaptability and development of the economy;
>
> (b) to provide consumers with competitive prices and product choices;
>
> (c) to promote employment and advance the social and economic welfare of South Africans;
>
> (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;

increase market transparency and develop public awareness of the provisions of the Act, the investigation and evaluation of practices prohibited by the Act[3] and the referral of matters for adjudication to and appearance before the Tribunal,[4] as required by the Act.[5]

(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."

[3] Prohibited practices, categorised as horizontal or vertical, are set out in Part A of Chapter 2 of the Act.

[4] The Tribunal is a body of record established under section 26 of the Act which has jurisdiction throughout the Republic and functions in accordance with the Act. Its members are appointed by the President on the recommendation of the Minister. Its functions are set out in section 27 of the Act and include the adjudication "in relation to any conduct prohibited in terms of Chapter 2 or 3, by determining whether prohibited conduct has occurred, and if so, impose a remedy provided for in Chapter 6" of the Act.

[5] Sections 50 and 53 of the Act. Section 50 provides, in relevant part:

"(1) At any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.

(2) Within one year after a complaint was submitted to it, the Commissioner must—

(a) subject to subsection (3), refer the complaint to the Competition Tribunal, if it determines that a prohibited practice has been established; or

(b) in any other case, issue a notice of non-referral to the complainant in the prescribed form.

(3) When the Competition Commission refers a complaint to the Competition Tribunal in terms of subsection (2)(a), it—

(a) may—

(i) refer all the particulars of the complaint as submitted by the complainant;

(ii) refer only some of the particulars of the complaint as submitted by the complainant; or

(iii) add particulars to the complaint as submitted by the complainant; and

(b) must issue a notice of non-referral as contemplated in subsection (2)(b) in respect of any particulars of the complaint not referred to the Competition Tribunal.

. . .

(5) If the Competition Commission has not referred a complaint to the Competition Tribunal, or issued a notice of non-referral, within the time contemplated in subsection (2), or the extended period contemplated in subsection (4), the Commission must be regarded as having issued a notice of non-referral on the expiry of the relevant period."

Section 51 reads, in relevant part:

[3] The first respondent (Loungefoam), the second and third respondents (Gommagomma and its wholly owned subsidiary, Vitafoam) and the sixth respondent (Feltex) are manufacturers and suppliers of flexible polyurethane or block foam. Loungefoam and Vitafoam currently manufacture the foam for use in the furniture and bedding industry. Feltex, a wholly owned subsidiary of the seventh respondent (Kap), previously conducted the same business through one of its divisions until it sold the division to Loungefoam in 1999. It now manufactures the foam mainly for use in the automotive industry. Steinhoff Africa is a wholly owned subsidiary of the fifth respondent (Steinhoff) which, in turn, also holds a controlling interest in Loungefoam and, by virtue of its shareholding in Gommagomma, in Vitafoam as well.

[4] On 25 May 2007, the Commission received a letter from a former employee of Loungefoam, Mr Troy Carelse, who had commenced a foam manufacturing company in competition with Loungefoam and Vitafoam. Mr Carelse complained of anti-competitive conduct by his "opposition" (subsequently identified as Loungefoam and Vitafoam) within the foam manufacturing industry in relation to the supply of the imported chemicals used to produce the foam. This letter prompted the Commission,

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"(1) If the Competition Commission issues a notice of non-referral in response to a complaint, the complainant may refer the complaint directly to the Competition Tribunal, subject to its rules of procedure.

(2) A referral to the Competition Tribunal, whether by the Competition Commission in terms of section 50(1), or by a complainant in terms of subsection (1), must be in the prescribed form."

In terms of section 53, the Commissioner, or any person appointed by the Commissioner, is among the persons who may participate in a hearing, in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing.

on 3 September 2007, to commence a formal complaint initiation process under the Act[6] against Loungefoam and Vitafoam for –

> "[p]rice fixing and dividing markets by allocating customers in contravention of sections 4(1)(b)(i) and 4(1)(b)(ii) [of the Act and] [e]xclusionary acts, inducement, predatory pricing and buying up scarce resources in contravention of sections 8(c), 8(d)(i), 8(d)(iv) and 8(d)(v) [of the Act]".[7]

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[6] Section 49B of the Act provides, in relevant part:

> "(1) The Commissioner may initiate a complaint against an alleged prohibited practice.
>
> (2) Any person may—
>
> (a) submit information concerning an alleged prohibited practice to the Competition Commission, in any manner or form; or
>
> (b) submit a complaint against an alleged prohibited practice to the Competition Commission, in the prescribed form.
>
> (3) Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable."

[7] Section 4 provides, in relevant part;

> "(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if—
>
> . . .
>
> (b) it involves any of the following restrictive horizontal practices:
>
> (i) directly or indirectly fixing a purchase or selling price or any other trading condition;
>
> (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services".

The relevant parts of section 8 provide:

> "It is prohibited for a dominant firm to—
>
> . . .
>
> (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) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive, gains which outweigh the anti-competitive effect of its act:
>
> (i) requiring or inducing a supplier or customer to not deal with a competitor;
>
> . . .
>
> (iv) selling goods or services below their marginal or average variable cost; or
>
> (v) buying-up a scarce supply of intermediate goods or resources required by a competitor".

[5] On 27 November 2007, the Commission initiated its own complaint alleging the same conduct against four additional parties, which included Feltex, albeit inaccurately described. (But nothing turns on this inaccuracy.) The purpose of this step was to expand the scope of the complaint process initiated in September 2007. According to the initiating statement, the parties sought to be added were implicated in conduct that is prohibited by the Act in the documents obtained from Loungefoam and Vitafoam during the investigation process. The Commissioner alleged that Feltex and Loungefoam had concluded a sale of business agreement which contained a reciprocal restraint of trade clause barring them from competing against each other which remained extant between them despite its expiry in 2004. According to the Commissioner, this resulted in Feltex, Loungefoam and Vitafoam dividing the market in contravention of section 4(1)(b)(ii) of the Act. The other entities, Unimattress (Pty) Ltd, Strandfoam (Pty) Ltd and Feel-o-Foam (Pty) Ltd, were allegedly added to the complaint on the basis of evidence which suggested that they might have colluded with Loungefoam and Vitafoam in illegal market division and price fixing.

[6] Another complaint initiation followed on 26 May 2008. It expanded the investigation against Loungefoam, Vitafoam and Feltex to include Steinhoff and Kap consequent to the Commission's suspicion that the alleged collusion between the original respondents might be a product of collusion between Steinhoff and Kap. In

September 2008, the Commission referred a complaint to the Tribunal[8] against Loungefoam, Vitafoam, Feltex, Steinhoff and Kap alleging that—

(a) Loungefoam and Vitafoam had agreed to fix the purchase price of the chemicals necessary for the manufacture of the foam and the selling price of the foam that they produced and sold to furniture manufacturers in breach of section 4(1)(b)(i) of the Act;

(b) Loungefoam and Vitafoam had engaged in customer allocation by agreeing not to compete for certain customers in contravention of section 4(1)(b)(ii) of the Act by means of the "Foam Forum" that they had established at which they discussed pricing and customer allocation; and

(c) Loungefoam and Feltex had engaged in market division through the reciprocal restraint of trade covenant in their sale of business agreement, in contravention of section 4(1)(b)(ii) of the Act.

[7] All three firms opposed the referral. Loungefoam and Vitafoam admitted their participation in the "Foam Forum" and that they had agreed to the guidelines in relation to purchase prices to be paid for chemicals and selling prices offered to customers. However, they contended that such conduct was lawful as they were constituent entities within a single economic entity, Steinhoff, as envisaged in section 4(5) of the Act. They denied any wrongdoing. On 16 February 2010, the

[8] Section 51 of the Act.

Commission applied to the Tribunal, in terms of Tribunal Rule 18(1),[9] to amend its complaint referral in various respects which included: (a) a new allegation that Feltex was involved in price fixing with Loungefoam and Vitafoam with whom it jointly purchased chemicals in contravention of section 4(1)(b)(i) of the Act (the Feltex amendment); (b) a refutation of the claim that Loungefoam and Vitafoam were part of a single economic entity, alternatively an argument that if they were, that was a result of collusion between Steinhoff and Kap (the collusion amendment); and (c) a prayer that if it was proved that Loungefoam and Vitafoam were constituent firms of Steinhoff and had colluded with Feltex and consequently had administrative penalties imposed on them for the collusion, then Steinhoff, Gommagomma and Steinhoff Africa should similarly be held liable (the penalty amendment). Steinhoff Africa was sought to be joined to the referral contingent upon the success of the latter amendment.[10]

Tribunal proceedings

[8] The respondent firms objected to the amendments which they contended were legally incompetent and would render the referral excipiable. The main challenge against both the Feltex and collusion amendments was that the Commission had failed to initiate a complaint alleging a contravention of section 4(1)(b)(i) as required by section 49B(1) resulting in the absence of the jurisdictional fact of initiation for a

[9] Rule 18(1) of the Tribunal Rules reads:

> "The person who filed a Complaint Referral may apply to the Tribunal by Notice of Motion in Form CT 6 at any time prior to the end of the hearing of that complaint for an order authorising them to amend their Form CT 1(1), CT 1(2) or CT 1(3), as the case may be, as filed."

[10] The Commission initially sought the joinder of Steinhoff Africa, Feltex, Daun et Cie AG, Courthiel Holdings (Pty) Ltd, Phaello Mattress and Bedding Corporation (Pty) Ltd, and Restonic SA (Pty) Ltd.

referral. The joinder application was opposed on the same basis. The penalty amendment was contested on the reasoning that the plain wording of the Act does not allow the imposition of a fine on any entity other than the one found to have transgressed the provisions of the Act.

[9] The Tribunal granted all the amendments and the joinder application in a judgment delivered on 8 June 2010. Regarding the Feltex amendment, it acknowledged that the Commission had not initiated a complaint against Feltex but reasoned that the September 2007 complaint initiation about a chemical purchasing cartel was sufficient to found the jurisdictional requirement for a referral against Feltex. This was so, it said, because the Commission merely has to "provide a rational link between the conduct complained of and a relevant section of the Act"[11] to establish the jurisdictional requirement for a referral, since "[t]o require the Commission to go back and initiate a fresh complaint every time it uncovered a new, potential respondent . . . would render the schema unworkable and would undermine the very purpose of th[e] Act".[12] The Tribunal applied the same reasoning to the collusion amendment. It found a rational link between the Commission's initiation statement of May 2008 that "the relationship between the parties and Steinhoff appears to have orchestrated the collusive conduct complained of" and section 4(b)(1)(i) and (ii).[13] The Tribunal concluded that "there was no need for the Commission at that stage to identify exactly which, how many or even which

[11] Competition Commission v Loungefoam (Pty) Ltd and Others, In re: Competiti1on Commission v Loungefoam (Pty) Ltd and Others (103/CR/Sep08) [2010] ZACT 39 (8 June 2010) at para 62.

[12] Id at para 50.

[13] Id at para 62.

subsidiaries or divisions of the respondents were involved in collusive activities."[14] It provided no reason for granting the penalty amendment.

The CAC appeal

[10] Feltex and the other respondents (the Steinhoff respondents) appealed to the CAC against the whole judgment of the Tribunal and further applied to have the decision reviewed and set aside. The CAC (Wallis JA; Davis JP and Ndita AJA concurring) upheld the appeal in a decision delivered on 6 May 2011. Regarding the Feltex amendment, the nub of the CAC's reasoning was that a complaint must be initiated before it can be referred. In its view, this was chiefly because, first, section 49B(3) of the Act, which requires the Commission to direct an investigator to investigate a complaint, allows the firm targeted by the investigation to engage with the Commission and demonstrate its innocence before the matter proceeds to the referral stage, thus avoiding the potential reputational damage attendant on a public charge of being involved in anti-competitive conduct.

[11] Furthermore, section 67(1) of the Act, which bars the initiation of a complaint more than three years after the prohibited practice has ceased, renders the date of initiation of a complaint crucial for its application. This is because the date for determining the three-year period is the complaint initiation date. Relying on a judgment of the Supreme Court of Appeal and a later judgment of the CAC applying

[14] Id at para 65.

it,[15] the CAC held that the Commission's investigative powers arose from the initiation of a complaint which must be founded on information upon which a reasonable suspicion can be based. It concluded that the complaint initiation did not implicate Feltex in the chemical cartel and that there was, therefore, no jurisdictional basis for the referral against it.

[12] The CAC found that the Commission had in fact sought the collusion amendment on the ground that it wanted to implicate Steinhoff in the collusive conduct, and not to counter the Steinhoff respondents' defence that they were part of a single economic entity. The CAC reasoned that it had to consider the amendment as it was before the Tribunal and that the Commission had tried impermissibly to change the amendment's meaning, basis and content. The CAC further found that the penalty amendment in terms of section 4(5)(b),[16] and the joinder of Steinhoff Africa, should have been refused.

[13] On 3 June 2011 the Commission applied to the CAC for leave to appeal to the Supreme Court of Appeal only against the orders made in respect of the collusion and penalty amendments. That application was set down for hearing on 9 December 2011. However, on 27 September 2011, the Commission, without withdrawing the CAC

[15] *Woodlands Dairy (Pty) Ltd and Another v Competition Commission* 2010 (6) SA 108 (SCA) (*Woodlands*) and *Netstar (Pty) Ltd and Others v Competition Commission South Africa and Another* 2011 (3) SA 171 (CAC), against which the Commission has lodged an appeal before the SCA.

[16] Section 4(5)(b) excludes the application of section 4(1) to an agreement between, or concerted practice engaged in by constituent firms within a single economic entity similar in structure to those referred to in section 4(5)(a) namely, a company, its wholly owned subsidiary, a wholly owned subsidiary of that subsidiary or any combination of them.

application, changed tack and launched the present proceedings in which, as indicated, it seeks leave to appeal directly to this Court against the whole judgment of the CAC.

The application for leave to appeal

[14] The Commission has three main contentions. First, it argued that the application raises critical constitutional issues which are fundamental to the manner in which it discharges its function of evaluating alleged prohibited practices and referring them to the Tribunal for adjudication. Second, it submitted that the CAC's finding, that there must be symmetry between the initiating document and the referral, is unduly restrictive and undermines the public's right to have anti-competitive conduct properly determined. Last, it contended that since delivery of the CAC's judgment, it has been inundated with objections to matters that it has referred to the Tribunal. And because it is unable to determine (i) the standard it is required to apply in formulating complaint initiations and (ii) its power to amend a referral as a result of divergent interpretations employed in the judgment in this matter, in *Woodlands* and in *Yara*,[17] it continued, it is unable to investigate and refer pending matters until the issues raised in this application, which have good prospects of success and require expeditious resolution, have been attended by this Court. The Commission is also not keen to have the matter adjudicated by the Supreme Court of Appeal. This is based on an alleged apprehension that the latter court will follow its previous reasoning in *Woodlands* and on the contention that the view of the Supreme Court of Appeal is not,

[17] A related CAC decision *sub nom The Competition Commission v Yara South Africa (Pty) Ltd and Others* (93/CAC/Mar10, 94/CAC/Mar10) [2011] ZACAC 2 (14 March 2011). A judgment against this decision has been handed down simultaneously with this judgment under CCT 81.

in any event, necessary as the matter does not involve the development of the common law.

[15] The respondents oppose the application on the grounds that the Commission's explanation for the delay in launching its application is unsatisfactory and that the Commission was obliged to first seek the CAC's leave to appeal against its decision in terms of section 63(2) of the Act. Regarding the merits, the Steinhoff respondents conceded that the appeal relating to the Feltex amendment raises a constitutional issue. But they contend that the Commission is perempted from pursuing it in this Court as it deliberately chose not to challenge it before the Supreme Court of Appeal. Moreover, they refute that the appeal, in relation to the question whether the Tribunal may hold an entity liable for prohibited practices committed by a subsidiary or associate company under its control, has any prospects of success.

[16] The threshold requirements for leave to appeal in this Court are firmly established. The issues to be determined in the appeal must be constitutional matters or issues connected with decisions on constitutional matters.[18] The fact that a matter raises a constitutional issue is, however, not decisive and leave may still be refused if it is not in the interests of justice to hear the appeal.[19] As to whether this application meets the first requirement presents no controversy. Issues concerning the powers and functions of an organ of state, such as the question of the scope and proper exercise of

[18] Section 167(3)(b) of the Constitution.

[19] Section 167(6) of the Constitution; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) at para 48; *Prophet v National Director of Public Prosecutions* [2006] ZACC 17*;* 2007 (6) SA 169 (CC); 2007 (2) BCLR 140 (CC) at para 45; and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) (*Boesak*) at para 12.

the statutory power of complaint initiation, investigation and referral vested in the Commission raised here, are indisputably constitutional matters.[20] The question, however, remains whether it is in the interests of justice to grant leave to appeal.

[17] In addressing this question, it is necessary to deal first with the preliminary issues raised by the respondents. Foremost is their contention that the provisions of section 63(2) of the Act constitute a bar to the grant of the application as they relate to this Court's jurisdiction to entertain the matter. Section 63 deals with a litigant's right to appeal against a decision of the CAC. It reads, in relevant part:

> "(1) The right to an appeal in terms of section 62(4)—
>
> (a) is subject to any law that—
>
> (i) specifically limits the right of appeal set out in that section; or
>
> (ii) specifically grants, limits or excludes any right of appeal;
>
> . . .
>
> (2) An appeal in terms of section 62(4) may be brought to the Supreme Court of Appeal or, if it concerns a constitutional matter, to the Constitutional Court, only—
>
> (a) with leave of the Competition Appeal Court; or
>
> (b) if the Competition Appeal Court refuses leave, with leave of the Supreme Court of Appeal or the Constitutional Court, as the case may be."

[18] Section 62 of the Act bears relevance too as it governs the appellate jurisdiction of the Tribunal and, more pertinently, the CAC and its place within the appellate

[20] *Competition Commission of South Africa v Senwes Ltd* [2012] ZACC 6 at Para 16 and 18; *Boesak* above n 19 at para 14; and *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 33.

hierarchy vis-à-vis the Supreme Court of Appeal and this Court. The relevant provisions of the section read:

> "(1) The Competition Tribunal and Competition Appeal Court share exclusive jurisdiction in respect of the following matters:
>
> (a) Interpretation and application of Chapters 2, 3 and 5, other than—
>
> (i) a question or matter referred to in subsection (2); or
>
> . . .
>
> (2) In addition to any other jurisdiction granted in this Act to the Competition Appeal Court, the Court has jurisdiction over—
>
> . . .
>
> (b) any constitutional matter arising in terms of this Act; and
>
> . . .
>
> (3) The jurisdiction of the Competition Appeal Court—
>
> (a) is final over a matter within its exclusive jurisdiction in terms of subsection (1); and
>
> (b) is neither exclusive nor final in respect of a matter within its jurisdiction in terms of subsection (2).
>
> (4) An appeal from a decision of the Competition Appeal Court in respect of a matter within its jurisdiction in terms of subsection (2) lies to the Supreme Court of Appeal or Constitutional Court, subject to section 63 and their respective rules."

[19] The Legislature's object in conferring appellate jurisdiction on both the Supreme Court of Appeal and this Court from the CAC in respect of constitutional and other matters listed in section 62(2) of the Act is evident from the plain wording of sections 62 and 63. Section 63(2) appears to provide that appeals from the CAC in respect of those matters lie to this Court subject to leave being obtained from the CAC in terms of section 63, obviously in recognition of its specialist status in respect of matters falling within the purview of the Act. Section 63(2)(a) reinforces the CAC's role in respect of the matters over which it enjoys concurrent jurisdiction by expressly

permitting an appeal to this Court and the Supreme Court of Appeal "only" with the leave of the CAC and allowing an approach for leave from this Court and the SCA "only" if the CAC refuses it.

[20] Section 167(6) of the Constitution, on the other hand, obliges—

> "national legislation or the rules of the Constitutional Court [to] allow a person, when it is in the interests of justice and with leave of the Constitutional Court (a) to bring a matter directly to the Constitutional Court; or (b) to appeal directly to the Constitutional Court from any other court."

Furthermore, section 16 of the Constitutional Court Complementary Act Amendment Act[21] grants the Chief Justice, acting in consultation with the President of the Supreme Court of Appeal, the power to make rules relating to the manner in which this Court may be engaged in any matter in respect of which it has jurisdiction. These Rules allow a person, when it is in the interests of justice and with leave of the Court, to bring a matter directly to it or to appeal directly to it from any other court. Rule 19 of the Constitutional Court Rules[22] gives effect to these provisions.

[21] The question is what meaning to ascribe to section 63(2) of the Act in light of section 167(6) of the Constitution. Central to this enquiry is the fact that the

[21] Act 79 of 1997.

[22] Rule 19(2) provides—

> "A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave."

provisions of the Constitution cannot be subordinate to statutory enactments. In addition, section 1(2)(a) of the Act itself requires that its provisions must be interpreted in a manner that is consistent with the Constitution.[23] But the wording of section 63(2) may be read to suggest more than one constitutionally compliant construction, because section 63(1)(a)(ii) appears to subordinate the right of appeal couched in section 62(4) to "any law that specifically grants" any right of appeal.

[22] One interpretation of section 63 is that it creates a bar, as the respondents contended. The words "any law" in section 63(1)(a), on this approach, refer only to national legislation as contemplated in section 167(6) and exclude the Constitution itself. This is inferred from the fact that the Act defines it and makes specific reference to "the Constitution" in some of its provisions. Furthermore, section 167(6) of the Constitution does not grant, limit or exclude a right of appeal as envisaged in section 62(4). The use of the word "only" before the two pre-conditions for an application for leave to appeal to the Supreme Court of Appeal and this Court, as set out in section 63(2), indicates a bar as it plainly means that an appeal to either the Supreme Court of Appeal or this Court lies solely when the CAC has granted or refused leave. Therefore, a litigant may not, under any circumstances, approach either court directly without first applying to the CAC for leave.

[23] An alternative interpretation of section 63(2) is that the Constitution, being law and indeed the supreme law, comfortably fits under the class of "any law" envisaged

[23] Section 39(2) of the Constitution enjoins every court, tribunal or forum, when interpreting legislation, to promote the spirit, purport and objects of the Bill of Rights.

in section 63(1)(a), as there is no specific contrary indication either in the provisions of the Constitution or those of the Act. When interpreted in the light of the Constitution, as it must be,[24] and "as adjunct to, and not exclusionary of, the Constitution's appellate structures",[25] the provisions of section 63(2) dovetail seamlessly with section 167(6). The resultant meaning which strains neither of the provisions is simple: A litigant who wishes to appeal to this Court against a decision of the CAC must first seek the CAC's leave unless the interests of justice permit a direct approach to this Court. In other words, the views of the CAC and the Supreme Court of Appeal remain obligatory except where the interests of justice under section 167(6) of the Constitution require that direct access be granted without the CAC's leave. This construction accords with the non-exclusive nature of appellate jurisdiction that the CAC enjoys. It permits the conclusion that section 63(2), therefore, creates no absolute bar to seeking leave for direct access to this Court.

[24] The conflicting constructions cannot both be correct. But that is not a problem that need be resolved in these proceedings for the compelling reason that the facts on record do not show compliance with either of the interpretations. The applicant has bypassed the CAC and seeks to make a direct appeal to this Court. Therefore, the requirement of the "bar" interpretation to seek the CAC's leave to appeal first before approaching the Supreme Court of Appeal or this Court has not been met. And, on the alternative interpretation, I am not persuaded that the interests of justice permit the

[24] See section 1(2) of the Act and *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 21.

[25] *American Natural Soda Ash Corporation and Another v Competition Commission and Others* 2005 (6) SA 158 (SCA) at para 13.

Commission to avoid the requirements of section 63(2) in the manner contemplated in section 167(6) of the Constitution, for the reasons that follow.

[25] The mainstay of the Commission's argument, as mentioned earlier, was that the matter is urgent and that it will be protracted unduly if required first to pass through the Supreme Court of Appeal whose view is irrelevant in any event, because the matter will ultimately end up in this Court. Accepting that the matter raises issues of public importance and assuming that there may well be good prospects of success in the appeal, these factors are nonetheless not decisive.

[26] Other factors must still be considered, particularly that the Commission has failed to show that the Supreme Court of Appeal will not deal with the matter expeditiously, or indeed give finality to some or even all of the issues between the parties. In the absence of a challenge to its constitutionality in either these proceedings or before the CAC, section 63(2) remains valid law in the absence of a declaration of invalidity. On this interpretation, it serves the critical purpose of ensuring that the decision-making of the higher appellate courts is informed by the expert views of the specialist CAC. Further, until the Legislature decides otherwise, the Supreme Court of Appeal also serves as a further filter in the appellate hierarchy, even in matters that do not explicitly involve the development of the common law.

[27] To that end, the Commission's steadfast assumption that it will not succeed before the Supreme Court of Appeal, based on the perceived difference between that

Court's decision in *Woodlands* and the CAC's judgment in this matter, deserves no credence.

Conclusion

[28] To summarise, the two possible approaches to section 63(2) yield the following result: (i) the Commission does not meet the "bar" test because of its failure first to seek leave from the CAC before approaching this Court; and (ii) the Commission has not shown any compelling circumstances that would justify a direct appeal, in the interests of justice, to avoid substantial injustice as envisaged in section 167(6). The matter falls to be dismissed on this basis alone and this finding renders it unnecessary to decide condonation of the Commission's seemingly excessive delay and further issues.

[29] The parties asked for costs in the event of their respective success. I see no reason why costs should not follow the result in the ordinary course in the circumstances.

Order

[30] Accordingly, the following order is made:

> The application for leave to appeal is dismissed with costs, including the costs of two counsel.

YACOOB ADCJ and CAMERON J:

[31] We have had the benefit of reading the judgment of Maya AJ (the main judgment), in which she concludes, without making a finding on condonation, that leave to appeal should be refused on grounds relating to section 63(2) of the Competition Act[1] (Act). She reaches this conclusion without deciding whether that provision constitutes a bar to an applicant for leave to appeal to this Court, or whether compliance with it is merely pertinent to this Court's determination of the interests of justice in considering leave to appeal. This is because, if the provision is a bar, the Commission has failed to seek the leave of the Competition Appeal Court, while, if it is relevant to the interests of justice, as envisaged in section 167(6) of the Constitution, the Commission has failed to show any compelling circumstances that would justify direct access to avoid substantial injustice.

[32] We differ from that conclusion. For the reasons we have set out in our judgment in *Competition Commission v Yara*,[2] we consider that there is no statutory bar preventing the Commission from seeking leave directly from this Court. For substantially similar reasons to those in *Yara*, we consider that the Commission has, in this matter, made out a case for condonation and for the grant of leave to appeal.

[33] In both cases, the Commission delayed its application to this Court by several months; in *Yara* just shy of five, in this matter by marginally less than four. The

[1] Act 89 of 1998.

[2] [2012] ZACC 14 (*Yara*). The judgment in *Yara* is handed down simultaneously with this judgment.

Competition Appeal Court delivered the judgment the Commission seeks to challenge in these proceedings on 6 May 2011. On 3 June 2011, the Commission applied to the Competition Appeal Court for leave to appeal to the Supreme Court of Appeal. That application was set down in the Competition Appeal Court for 9 December 2011. On 27 September 2011, the Commission lodged its application in this Court.

[34] In it, the Commission pointed out that it had "already applied to the Competition Appeal Court for leave to appeal to the Supreme Court of Appeal". What it failed to disclose was that this application traversed only some of the grounds on which it now objects to the Competition Appeal Court judgment.

[35] The Commission should have been more specific about the ambit of its pending application for leave to appeal. In this Court the Commission states in its founding papers that it will persist with that application only if this Court refuses it leave to appeal. It should rather have made one of these applications conditional, as is practice.[3]

[36] However, we find that in this instance these considerations do not justify barring the Commission access to this Court. For the reasons we set out in *Yara*, and in particular: (a) the importance of the Commission's public role; (b) the significance of the issues it seeks to have determined in the appeal; (c) the fact that there are

[3] *University of Witwatersrand Law Clinic v Minister of Home Affairs and Another* [2007] ZACC 8; 2008 (1) SA 447 (CC); 2007 (7) BCLR 821 (CC) at para 7; *Dudley v City of Cape Town and Another* [2004] ZACC 4; 2005 (5) SA 429 (CC); 2004 (8) BCLR 805 (CC) at para 4 and *Mkangeli and Others v Joubert and Others* [2001] ZACC 15; 2001 (2) SA 1191 (CC); 2001 (4) BCLR 316 (CC) at para 3. See also, Constitutional Court Rule 19(3)(d)(ii).

prospects of success in the appeal; and (d) that this is not a matter at the complex intersection of law and economics, but somewhat removed from it, combine to warrant the grant of leave.

[37] We except from our conclusion the sixth respondent, Feltex Holdings (Pty) Ltd, in respect of whom we consider that the Commission's appeal became perempted. Since this is a minority judgment, it will serve no purpose to set out our reasons at length. In short, the Commission's appeal against Feltex became perempted because, when the Commission applied to the Competition Appeal Court for leave to appeal to the Supreme Court of Appeal, it sought leave against only two groups of amendments. Neither of these involved Feltex. What is more the Commission in this Court recorded that it had "decided" not to pursue the Feltex appeal, but that after later advice it changed this decision. A "decision" not to appeal can only entail an abandonment of the right to appeal, in which case the appeal is perempted. As counsel for Feltex argued, it is hard to conceive of a clearer case.

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For the First, Second, Fourth, and Fifth Respondents:	Advocate D Unterhalter SC and Advocate MA Wesley instructed by Norton Rose South Africa.
For the Sixth Respondent:	Advocate A Cockrell SC and Advocate K Hofmeyr instructed by Shepstone & Wylie Attorneys.