Case No 7095

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

SA METAL & MACHINERY CO (PTY) LTD APPELLANT

and

CAPE TOWN IRON & STEEL

WORKS (PTY) LTD 1st RESPONDENT

NATIONAL METAL (PTY) LTD 2nd RESPONDENT

CHICKS SCRAP METALS SA (PTY) LTD 3rd RESPONDENT

CORAM: HEFER, VIVIER, EKSTEEN, HOWIE
et SCOTT JJA.

HEARD: 10 September 1996. DELIVERED: 26

September 1996

JUDGMENT

VIVIER JA/

VIVIER JA:

The appellant ("the plaintiff") instituted two separate actions for damages for breach of contract, based on the same contract, against the first respondent ("the first defendant") in the Cape Provincial Division. In the first action (case no 14421/92) second and third respondents ("second and third defendants") were joined as defendants but no relief was sought against them and they did not defend the action. The second action (case no 4411/93) was brought against the first defendant alone. The two actions were consolidated for purposes of trial. At the hearing before Berman J the parties agreed that a special defence raised by first defendant be dealt with first before the trial proceeded on the other issues. The special defence was that the contract upon which the plaintiff sued constituted both "horizontal price collusion" and "horizontal collusion on conditions of supply" within the meaning

of those expressions in Government Notice no 801 ("the Notice") published in Government Gazette 10211 of 2 May 1986 pursuant to sec 14(5) (a) of the Maintenance and Promotion of Competition Act 98 of 1979 ("the Act"), and was for that reason unlawful. Herman J upheld the special defence and granted an order declaring the contract to be unenforceable. The plaintiff was ordered to pay the costs relating to the special defence. With the leave of the Court a quo the plaintiff now appeals to this Court. The parties all carry on business in the scrap metal industry. The plaintiff's case as pleaded was that during October 1989 and at Cape Town a written contract regulating the supply of scrap metal by suppliers to consumers in Cape Town was concluded by the plaintiff, third defendant, African Detinning Works (Pty) Ltd and Metal Salvage Company (Pty) Ltd, as suppliers, and a number of consumers, including the first defendant. Subsequently

African Detinning Works (Pty) Ltd closed down its Cape Town operations and the rights and obligations of Metal Salvage Company (Pty) Ltd were assumed by second defendant. There is a dispute on the pleadings as to whether the contract was concluded in writing or orally but for present purposes it is common cause that the terms of the contract appear from two documents ("PC 1" and "PC 2") annexed to the plaintiff's amended particulars of claim in case no 14421/92.

It appears from the introductory paragraphs of PC 1 that there existed at the time a 7,5% price preference on exports of steel scrap from this country and that meetings were held between the various interested parties in order to "find a way whereby scrap currently being exported could be retained in the country for local beneficiation". This resulted in an agreement between the parties that scrap metal would be supplied by suppliers to consumers in

Cape Town on the terms and conditions set out in PC 1 and PC 2.

It is necessary at this point to refer in some detail to these terms and conditions. The references are to PC 1. Clause 1 provided for a formula for the quarterly calculation of the base price of grade 201 heavy melting scrap to be supplied to the first defendant. Clause 2 provided for a grading schedule identifying a number of grades of scrap metal, the prices of grades other than grade 201 heavy melting scrap being expressed as a percentage above or below that of grade 201 heavy melting scrap which was taken to be the base of 100%. Detailed specifications for such grades were provided in order to maintain a quality grade of scrap for the market. Clause 3 made provision for a downgrading procedure allowing for a particular consignment to be downgraded at the instance of a consumer. Clause 5 provided for a tiered buying system whereby consumers undertook to purchase ferrous

scrap at different prices from suppliers in different categories. "A" level suppliers such as the plaintiff and second and third defendants were to be paid the full formula price whereas the so-called "B" level smaller suppliers (those able to deliver at least 300 tons per month) would get 20 percent less than the "A" level suppliers. Consumers were not permitted to buy from any other suppliers and African Detinning (Pty) Ltd was allowed to supply only one specified grade of scrap. In terms of Clause 6 a railage subsidy was payable by first defendant to "A" level suppliers in respect of scrap metal railed from railway stations more than 60km from first defendant's place of business. In Clause 7 provision was made for the procedure to be followed when export permits were applied for. Clauses 9 and 10 dealt with the supply of scrap to Atlantis Diesel Engines (Pty) Ltd and other foundries and it provided that in the event of the foundries not taking up their pro

rata annual requirements in the course of a particular year as advised to the suppliers in January of that year, the first defendant would be obliged to accept the surplus quantity. In terms of Clause 11 the first defendant could continue to buy scrap from generators where it currently supplied a bin service but it was not permitted to seek further such business. The prices for such purchases would be 20% below the prices paid to level "A" suppliers such as the plaintiff. In terms of Clause 12 the first defendant was allowed to continue purchasing scrap from a supplier in Uitenhage at prices higher than those payable to the Cape Town suppliers but it was precluded from making any other purchases at prices higher than those provided in Clauses 5 and 6. In terms of Clause 13 first defendant and the foundries had to pay the suppliers by not later than the 25th of the month following the receipt of scrap at their works. Clause 15 provided as follows :

"Consumers undertake not to enter into any arrangements affording individual suppliers more advantageous terms than envisaged herein, whether by way of price, grading, payment terms or any other method."

In case no 14421/92 the plaintiff's claim for damages was for alleged underpayments on light steel scrap delivered by it to the first defendant as well as on maximum railage subsidies due to it by first defendant. With regard to the deliveries of light steel scrap plaintiff's case was that by accepting from the second defendant deliveries of light steel mixed with heavy melting scrap (which it alleged was not permissible under the contract) and by paying second defendant for such mixed steel at the prevailing price for grade 201 heavy melting scrap without advising the plaintiff thereof, the first defendant breached its obligation under the contract to afford equal treatment to all suppliers and not to extend favourable terms afforded to certain suppliers also to the plaintiff.

The first defendant was accordingly obliged to pay the plaintiff for the light steel supplied by it on the same basis as it had paid the second defendant. Case no 4411/93 was a claim for an alleged underpayment in respect of scrap metal supplied to first defendant during February 1993.

I now turn to the relevant provisions of the Act and the Notice. According to its long title the Act seeks to maintain and promote competition in the economy and to prevent or control, inter alia, restrictive practices. The expression "restrictive practice" is defined in the Act. To this end the Act provides for the establishment of a Competition Board ("the Board") and for the Board to conduct investigations into, and report upon, inter alia, restrictive practices and for ministerial regulation of such practices through notices in the Government Gazette. During 1985 the Board carried out an investigation of a general nature in terms of

sec 10(1)(c) of the Act into, what it called, collusion on prices and conditions, market sharing and tender practices. Sec 10(1)(c) provides for an investigation by the Board into, inter alia, any particular type of business agreement, arrangement, understanding, business practice or method of trading in general which, in the opinion of the Board or the Minister, is commonly adopted for the purpose of or in connection with the creation or maintenance of restrictive practices. The Board found that "horizontal price collusion" and "horizontal collusion on conditions of supply" amounted to "restrictive practices" in terms of the Act and were not justified in the public interest. The Board recommended to the Minister that such practices be declared unlawful. The Board's report to the Minister and the text of the proposed notice were published in Government Gazette 9959 of 4 October 1985.

This was followed by the publication of the Notice in terms of sec 14(5) (a) of the Act in which the Minister declared unlawful and prohibited any agreement, arrangement, understanding, business practice or method of trading which constituted, inter alia, a "horizontal price collusion" or a "horizontal collusion on conditions of supply", as defined in the Notice. The expression "restrictive practice" does not appear in the Notice.

The definition of "horizontal price collusion" in the Notice includes any agreement, arrangement or understanding between or among two or more suppliers of any commodity, or of substantially similar commodities, to charge a particular, or a particular minimum, price or to use in any way any price as a recommended price or as a guide, whether or not such price is determined or is to be determined by calculation or by reference to any discount. Included in the definition of "horizontal collusion

on conditions of supply" is any agreement etc between or among two or more suppliers of any commodity, or of substantially similar commodities, to supply, or to tender to supply in response to a call or request for tenders, such commodity or commodities only on any particular condition or term or using any condition or term as a recommended condition or term or as a guide. The word "commodity" is defined in para 10(b) of the Notice as including, inter alia, any make or brand of any commodity. It was not in dispute that scrap metal was a commodity within the meaning of the Notice. The word "supplier" is defined in para 10(f) of the Notice as including, unless the context otherwise indicates, the manufacturer, producer, seller and reseller of goods, ie persons at different stages or levels in the chain of supply. The meaning of the word "horizontal" in the phrases "horizontal price collusion" and "horizontal collusion on conditions of supply" is, however,

clear and confines the prohibition to agreements etc between suppliers who are functioning horizontally, or on the same level in the supply chain. (National Home Products) (Pty)v Vynide Ltd and Others 1988 (1) SA 60 (W) at 69 C-H). In the present case the plaintiff and second and third defendants were all suppliers operating in a horizontal relationship with one another. The other parties to the contract viz the consumers stood in a vertical relationship with them.

Counsel for the plaintiff submitted that it was not possible ex facie the present contract to say that it constituted either a horizontal price collusion or a horizontal collusion on conditions of supply. He submitted that the onus of proving illegality was on the first defendant and that in the absence of evidence of background circumstances the first defendant had failed to discharge this onus. He submitted that a proper construction of the contract indicated the

opposite namely that it was not an agreement, arrangement or understanding between the suppliers inter se aimed at imposing any price or other terms. He emphasised that, according to the introductory paragraphs of PC 1, the contract was not concluded in an anti-competitive setting but that it was primarily aimed at benefiting the consumers by making available scrap metal for the local market which would otherwise have been exported. It was submitted that the contract provided no more than the basis upon which the consumer parties would purchase their requirements of scrap metal from the suppliers. The mutuality of obligations thus existed, so the argument proceeded, only between consumers on the one hand and suppliers on the other and there were no terms the breach of which by one supplier could found an action against him by another supplier. The contract differed little from a number of identical individual contracts each between a particular consumer

and a particular supplier.

I cannot agree with the construction of the contract contended for by counsel for the plaintiff. The fact that the parties may in the first place have intended to benefit the consumers by ensuring a supply of scrap metal for the local market, or the fact that there were also other parties to the contract whose relationship with the suppliers was vertical, cannot affect the true nature of the contract as regards the suppliers. For them the contract, according to its clear and unambiguous terms, created reciprocal rights and obligations inter ae which related, inter alia, to the charging of particular, uniform prices and the supplying of scrap metal on certain specified and uniform terms.

In terms of Clauses 2, 5 and 12 the suppliers among themselves became bound not to charge any other than the particular prices stipulated. Although the formula for calculating

the base price took account of the market price of grade 201 heavy melting scrap it was still a "particular price" within the meaning of that expression in the Notice. The suppliers furthermore agreed among themselves to supply only on particular terms and conditions. These included terms relating to the payment of a railage subsidy (Clause 6); dates for payment (Clause 13); and procedures for downgrading consignments (Clause 3) and exporting surplus scrap (Clause 7). Certain terms dealt directly with the relationship between suppliers inter se such as the provision in Clause 5 that the plaintiff and second and third defendants would be paid the full formula price whereas the smaller suppliers would get 20% less and that African Detinning (Pty) Ltd would only be allowed to supply one specified grade of scrap. In my view each supplier became contractually bound to the other suppliers not to accept more favourable terms from a consumer than those accorded

to other suppliers.

With regard to the contention that the present contract differs little from a number of identical individual contracts which could validly have been concluded between each supplier and consumer, the short answer is that, by acting together in concluding a single contract the suppliers ensured that uniform terms, acceptable to all of them and binding on all of them, were adopted. Individual contracts could have been amended by the parties to that contract, whereas the contract in issue could only have been amended with the consent of all parties (Clause 14). Any "arrangement" between suppliers to contract individually with the suppliers on identical terms would also have been hit by the prohibition.

Counsel for the plaintiff further submitted that collusion in the sense of deception, fraud or secrecy was required as an essential element of both " horizontal price collusion" and

"horizontal collusion on conditions of supply", and that this has not been established. Although the word "collusion" appears in both, it is clear from the definitions of both phrases contained in the Notice that no element of deception, fraud or secrecy is required for an agreement, arrangement or understanding to constitute either a "horizontal price collusion" or a "horizontal collusion on conditions of supply". From the context in which the word "collusion" is used in the definitions of "horizontal price collusion" and "horizontal collusion on conditions of supply" it is clear, in my view, that it bears no other meaning in the said prohibitions than "to act jointly" or "to act in concert". That this is the proper construction of the word is shown by the exclusionary provisions in paras 4(c) and 5(c) of the Notice where the issue of a tariff of recommended fees for professional service by members of an organised profession or a recommendation that such service be

provided on a particular condition or term is expressly excluded from the prohibition under certain circumstances. These provisions imply, in my view, that collusion in the sense of acting jointly or acting in concert was regarded as sufficient to constitute a "horizontal price collusion" or a "horizontal collusion on conditions of supply", as it is hardly conceivable that such a tariff or recommendation would be issued or made in the sinister sense of the word "collusion" contended for by counsel for the plaintiff.

For the above reasons I am of the view that ex facie the contract it constitutes both "horizontal price collusion" and "horizontal collusion on conditions of supply" as defined in the Notice. I should add that the contract also clearly constitutes a restrictive practice as defined in sec 1 of the Act. This expression is there defined as including any agreement, arrangement or understanding which restricts competition directly or indirectly by

having or being likely to have the effect, inter alia, of enhancing or maintaining the price of or any other consideration for any commodity (subpara (iii)); or of preventing or restricting the entry of new producers or distributors into any branch of trade or industry (subpara (vi)). For the reasons I have given the present contract clearly has the effect of enhancing or maintaining the price of scrap metal. By prohibiting the consumers from buying from any other suppliers the contract also has the effect of preventing or restricting the entry of newcomers into the market.

The special defence was therefore correctly upheld by the Court a quo. The appeal is dismissed with costs, such costs to include the costs of two counsel.

W VIVIER JUDGE OF APPEAL HEFER JA)

SCOTTJA)