IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number: 176/2000

In the matter between:

SOUTH AFRICAN RAISINS (PROPRIETARY) LIMITED 1st Appellant

SLABBER 2nd Appellant

and

S A D HOLDINGS LIMITED

1st Respondent

S A D VINE FRUIT (PROPRIETARY) LIMITED 2nd Respondent

CORAM: **GROSSKOPF, HOWIE, PLEWMAN JJA, MELUNSKY and FARLAM AJJA**

HEARD: **14 SEPTEMBER 2000**

DELIVERED: **29 SEPTEMBER 2000**

Competition Act 89 of 1998 - Whether raisin industry falls within its ambit or within the Marketing of Agricultural Products Act 47 of 1996

JUDGMENT

MELUNSKY AJA:

[1] This is an appeal against a decision of Ngoepe JP in the Transvaal Provincial Division. The appellants, who were the unsuccessful respondents in the court *a quo*, appeal to this Court with the leave of the learned Judge President. The main question for decision is whether Ngoepe JP was correct in holding that certain orders made by the Competition Tribunal ("the Tribunal"), a body established in terms of s 26 of the Competition Act 89 of 1998, were null and void. This, in turn, depends upon whether the Competition Act applies to the raisin industry, a field in which the first appellant and the respondents are competitors. It seems to be largely due to the lucrative export market that the humble raisin is at the heart of this appeal.

[2] The first respondent, which was a co-operative in terms of the Co-operative Act 91 of 1981, was converted to a public company on 29 July 1998 pursuant to the provisions of s 161 A of that Act. The second respondent, a wholly owned subsidiary of the first respondent, carries on a raisin processing business at Upington. For many years, and long before the first respondent became a company, it occupied a dominant position in the dried fruit and raisin market. It alone was authorised to market raisins in and outside South Africa. The position changed once the Marketing of Agricultural Products Act 47 of 1996 came into force. With the repeal of earlier legislation by that Act the first appellant was able to, and did, enter the raisin industry. By February 1998 it had established a raisin processing plant at Marchand in the Northern Cape. Since then it has competed with the respondents and more particularly with the first respondent in the export field. The second appellant is a director of the first appellant and seems to be directly involved in its activities. He is also a producer of raisins.

[3] The initial dispute involving the first appellant and the first respondent related to the use of the latter's half-ton storage containers in which raisins were delivered to the first respondent by its producers. It appears that certain raisin

producers delivered their produce to the first appellant in these containers. As a result the first respondent sought and obtained an order in the Northern Cape Division of the High Court on 10 November 1998 in terms whereof the first appellant was interdicted from using or receiving the first respondent's containers. The matter did not end there for on 3 December 1999 both appellants were found guilty in the same court of contempt of court as a result of breaches of the earlier order.

[4] In the meantime, on 12 October 1999, the first appellant had lodged a complaint with the Competition Commission, a body established in terms of s 19 of the Competition Act. According to the complaint, which was lodged under s 44 of the Act, the respondents were alleged to have committed various acts which, it was claimed, constituted prohibited practices in terms of the Act. On the same day the appellants brought an application for temporary relief before the Tribunal in terms of s 59 of the Act in which it was alleged that the respondents had committed a prohibited practice by, *inter alia*, requiring or inducing producers of raisins not to deal with the first appellant. On 24 November 1999 the Tribunal granted an interim order which interdicted the respondents from requiring or inducing producers of "grapes-for-raisins" to refrain from dealing with the first appellant pending a decision on the complaint. Against this order the respondents filed a "Notice of Appeal and Review" to the Competition Appeal Court, a court established by s 36 of the Act. This activated the appellants into approaching the Tribunal again and pursuant thereto the Tribunal, on 24 December 1999, purported to rule that the interim order was not appealable and declare the respondents' notice of appeal to be invalid.

[5] It was as a result of the aforesaid orders by the Tribunal that the respondents launched their application in the court *a quo*. They requested that the orders made by the Tribunal should be suspended pending the hearing of an appeal to the Competition Appeal Court. The High Court's assistance was essential, it was said, because at that stage the Competition Appeal Court had not been constituted. Some days before the hearing in the court *a quo* the respondents gave notice of an application to amend the notice of motion by requesting the addition of more substantial prayers, viz that the Competition Act did not apply to the raisin industry, and that in consequence the Tribunal was not competent to make the orders which it had issued. Despite the appellants' opposition the learned Judge President granted the amendment. He held further that the Competition Act did not apply to the raisin industry and that therefore the Tribunal did not have the jurisdiction to make the orders on 24 November and 24 December 1999. In consequence he declared the Tribunal's orders to be null and void and of no force and effect. That is the decision which is the subject of this appeal.

[6] Before considering the issues raised by the parties on the merits of the appeal, it is necessary to dispose of a preliminary point - whether in terms of s

21 A of the Supreme Court Act 59 of 1959 the decision of this Court will have any practical effect or result. That question arises because in terms of s 52(2) of the Competition Act an interim order may not extend for a period of six months or beyond the conclusion of the hearing into the alleged prohibited practice, whichever is the earlier. Although a Tribunal is empowered to extend an interim order for an additional period not exceeding six months, it did not do so in this instance. The result was that the interim order issued on 24 November 1999 had expired on 23 May 2000, more than three months before the hearing of this appeal. The issues raised by the first appellant's complaint, which was brought under s 44 of the Act, have not yet been determined and in view of the decision of the court *a quo* the Competition Commission is apparently uncertain whether it is entitled to proceed with the matter. It seems to be obvious, therefore, that it is of vital importance for the parties to obtain a final ruling on whether the Competition Act applies to the raisin industry. At the very least this Court's decision will determine whether the Competition Commission may investigate the first appellant's complaint which is still before it. To this extent the outcome of the appeal will clearly have a practical effect.

[7] In order to appreciate the merits of the dispute it becomes necessary in the first instance to have regard to certain provisions of the Competition Act and the Marketing of Agricultural Products Act. According to the court *a quo*, the activity which was the subject of the dispute between the parties, and which was adjudicated upon by the Tribunal, was the marketing of raisins. This activity, in the view of Ngoepe JP, had been taken out of the ambit of the Competition Act by s 3(1)(d) of that Act, read in conjunction with s 1(1) and (2) of the Marketing of Agricultural Products Act and a declaration by the Minister of Agriculture in Government Notice R 1189 published in Government Gazette 18270 of 4 September 1997 to the effect that "fruit and nuts" are agricultural products for the purposes of the latter Act. The learned Judge President's conclusion that raisins are fruit was not seriously challenged on appeal and, in my view, rightly so. Whatever processes raisins may be subject to, they are fundamentally dried grapes and thus fall within the meaning of fruit for the purposes of Government Notice R 1189.

[8] More difficult to interpret and apply, perhaps, is s 3(1)(d) of the Competition Act, which must be read with the definitions of "public regulation" and "regulatory authority" in s 1(1) of the same Act. According to s 3(1) the Competition Act applies to all "economic activity" within, or having an effect within the Republic, save for five exceptions, one of which is

> "(d) acts subject to or authorised by *public regulation*".

"Public regulation" is defined to mean:

> "Any national, provincial or local government legislation or

> subordinate legislation, or any licence, tariff, directive or similar authorisation issued by a *regulatory authority* or pursuant to any statutory authority."

"Regulatory authority" is defined as follows:

> "An entity established in terms of national, provincial or local government legislation or subordinate legislation responsible for regulating an industry or section of an industry."

[9] In *Standard Bank Investment Corporation Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA), Schutz JA, who delivered the majority judgment, held that the expression "all economic activity" in s 3(1), while apparently extending to countless forms of activity which people undertake in order to earn a living, should not be given an unlimited extension (at 807 G-H, par [9]). More significantly for present purposes, the learned judge (at 807I-808A, par [9]) considered that the word "acts" in s 3(1)(d) should be confined to acts which are dealt with in chapters 2 and 3 of the Act and which broadly may be described as

> "actually or potentially monopolistic or anti-competitive agreements, practices or acts which are grouped under the headings restrictive horizontal practices, restrictive vertical practices, abuse of dominant position and mergers".

To these the learned judge gave the generic term "monopolistic acts". It is not in issue that the dispute between the appellants and the respondents concerns an "economic activity" within the meaning of s 3(1), for the first appellant and the

respondents are competitors in the same field and the said dispute is due to such competition. It is also not in issue that the "acts" attributed to the respondents by the appellants are acts of the kind referred to by Schutz JA at 807I - 808A. What is in issue is whether these acts are "subject to or authorised by public regulation".

[10] The decision of the court *a quo* was based substantially on the fact that the Minister had declared fruit to be "agricultural products" for the purposes of the Marketing of Agricultural Products Act. The mere marketing of fruit was considered by Ngoepe JP to be an act "subject to or authorised by public regulation" and "public regulation" included the aforesaid Act and the Minister's declaration made thereunder. As the dispute between the parties related to the marketing of dried grapes, it followed, according to the court *a quo*, that the activity fell outside the scope of the Competition Act.

[**11]** In the appeal counsel for the respondents referred to other provisions of the Marketing of Agricultural Products Act, including s 2 which reads:

> "**Intervention in marketing of agricultural products.**-(1) A statutory measure may only be introduced in terms of this Act if the Minister is satisfied that such measure will directly and substantially advance one or more of the objectives mentioned in subsection (2), without being substantially detrimental to one or more of such objectives.
>
> (2) The objectives of this Act are-
>
> (a) the increasing of market access for all market participants;
>
> (b) the promotion of the efficiency of the marketing of agricultural products;

(c) the optimisation of export earnings from agricultural products;

(d) the enhancement of the viability of the agricultural sector.

(3) No statutory measure or prohibition in terms of section 22 which is likely to be substantially detrimental to food security, the number of employment opportunities within the economy or to fair labour practice may be instituted in terms of this Act."

A "statutory measure" is defined in s 1(1) to mean:

> "a levy contemplated in section 15, and a direction contemplated in sections 16, 18 and 19."

Section 16 deals with directions that the Minister may issue in relation to the control of exports of agricultural products and ss 18 and 19 deal with the Minister's directions concerning the keeping of records and the registration of certain persons respectively. According to information given to us by counsel, no directions of any kind have been issued in terms of the said Act in respect of the marketing of raisins.

[12] Counsel for the respondents also referred to other provisions of the Marketing of Agricultural Products Act, notably the long title and s 9. The former proclaims that the Act is

> "to authorise the establishment and enforcement of regulatory measures to intervene in the marketing of agricultural products".

Section 9 provides for the functions of the National Agricultural Marketing Council which include "investigating regulatory measures affecting the

marketing of agricultural products". Because of these and other provisions in the aforesaid Act, it was submitted on the respondents' behalf that the Minister of Agriculture has the power to investigate all complaints relating to the marketing of raisins and to impose appropriate regulatory measures dealing therewith. Thus it is argued that the "acts" referred to in s 3(1)(d) of the Competition Act fall within the scope of the Marketing of Agricultural Products Act.

[13] It is, however, clear that the Marketing of Agricultural Products Act, while having as one of its objects the regulation of certain activities relating to agricultural products, does not in itself control, authorise or regulate such activities. It is an enabling act which entitles the Minister to take the steps authorised by its provisions. I shall assume for present purposes that one of the steps he is authorised to take is to regulate "monopolistic acts" in order to promote competition in respect of the marketing of raisins. The fact is that he has not done so in respect of raisins. Can it be said that his power to regulate in terms of the Marketing of Agricultural Products Act is an act "subject to or authorised by public regulation"?

[14] Counsel for the respondents, in attempting to provide an appropriate meaning to the words "subject to", relied upon the decision in *Sentra-Oes Koöperatief Bpk v Commissioner for Inland Revenue* 1995 (3) SA 197 (A) in which, at 207C-F, the construction adopted in *S v Marwane* 1982 (3) SA 717 (A) at 747H - 748B was applied. In both of these cases the expression "subject

to" was used in a different context to that employed in s 3(1)(d), viz to establish which of two statutory provisions was to prevail in the event of a conflict between them. Those decisions, therefore, do not assist in resolving the dispute before us.

[15] If the phrase "subject to" is given the interpretation suggested by the respondents' counsel the effect would be to exclude agricultural products from any anti-monopolistic measures until such time as the regulatory authority decided to impose them in relation to each specific product. This seems to be contrary to the overriding purpose and intention of the legislature in enacting the Competition Act, the preamble of which reads:

> "THE PEOPLE of South Africa recognise:
>
> That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, weak enforcement of anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.
>
> That the economy must be open to greater ownership by a greater number of South Africans.
>
> That credible competition law, and effective structures to administer that law are necessary for an efficient functioning economy.
>
> That an efficient, competitive economic environment, balancing the interest of workers, owners and consumers and focussed on development, will benefit all South Africans.
>
> IN ORDER TO-
>
> provide all South Africans equal opportunity to participate fairly in the national economy;
>
> achieve a more effective and efficient economy in South Africa;
>
> provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;
>
> create greater capability and an environment for South Africans to compete effectively in international markets;
>
> restrain particular trade practices which undermine a competitive economy;
>
> regulate the transfer of economic ownership in keeping with the public interest;
>
> establish independent institutions to monitor economic competition; and
>
> give effect to the international law obligations of the Republic."

That it is permissible to give effect to the policy or object or purpose of the legislation, where there is ambiguity, is clear from paras [16]-[21] (pp 810D - 812B) of *Standard Bank Investment Corporation*. If the phrase "subject to" is

open to more than one meaning it should be interpreted to give effect to the policy and purpose of the statute. I add, however, that in my view the words "subject to .... public regulation" in s 3(1)(d) are not ambiguous. The definition of "public regulation" applies, *inter alia*, to actual legislation and to a

> "directive or similar authorisation *issued* by a regulatory authority or pursuant to any statutory authority" (my emphasis).

It seems to be reasonably clear from the definition that s 3(1)(d) applies to a directive that has actually been made and the expression "subject to" should be interpreted in this sense. There is little doubt that the words "authorised by" bear a similar meaning and apply only to existing directions etc.

[16] In the absence of any existing legislation, or directives or authorisations pursuant to the Marketing of Agricultural Products Act, the provisions of that Act are not made applicable to the raisin industry by s 3(1)(d) of the Competition Act. It is the Competition Act that applies to the raisin industry and as this is so the Tribunal was competent to issue the interdict. In terms of s 65(3) of that Act the Tribunal and the Competition Appeal Court have exclusive jurisdiction in respect of certain matters. It is only the Tribunal that may grant an interdict to put an end to a prohibited practice and only the Competition Appeal Court that may consider an appeal from a decision of the Tribunal. It

therefore follows that the learned Judge President erred in holding that the Tribunal had no jurisdiction to make the orders of 24 November 1999. The appeal against his decision in that regard should therefore succeed. It is open to some doubt whether the Tribunal was entitled to make the orders of 24 December but in view of the conclusion at which I have arrived, it is unnecessary to express an opinion thereon.

[17] On the respondents' behalf it was submitted that this Court should, in the alternative, grant the respondents the relief that was originally sought in the court *a quo*, ie, to suspend the operation of the Tribunal's orders pending the hearing of an appeal to the Competition Appeal Court. I shall assume, without deciding, that it may be competent to grant such an order in the absence of a cross-appeal. Leaving aside whether the High Court has jurisdiction to deal with matters falling within the exclusive domain of the Tribunal, the relief sought by the respondents is now purely academic. The interim order issued by the Tribunal has expired. The order or judgment sought in this regard will have no practical effect or result.

[18] In the circumstances the following order is made:

1. The appeal is allowed with costs, including the costs occasioned by the employment of two counsel;

2. The judgment of the court *a quo* is set aside and is replaced with the following:

> "Application dismissed with costs, including the costs occasioned by the employment of two counsel."

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L S MELUNSKY
ACTING JUDGE OF APPEAL

CONCUR:

F H GROSSKOPF JA)
HOWIE JA)

PLEWMAN JA)
FARLAM AJA)