REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 577/2002

Reportable

In the matter between:

AMERICAN NATURAL SODA CORPORATION First Applicant
CHC GLOBAL (PTY) LIMITED Second Applicant

and

THE COMPETITION COMMISSION OF SOUTH AFRICA First Respondent
BOTSWANA ASH (PTY) LTD **S**econd Respondent
CHEMSERVE TECHNICAL PRODUCTS (PTY) LIMITED Third Respondent

CORAM: VIVIER ADP, ZULMAN, FARLAM, LEWIS JJA et MLAMBO AJA

HEARD: 7 MAY 2003

DELIVERED: 2 JUNE 2003

SUMMARY: Competition Act 89 of 1998 ─ appealability of decisions of Competition Appeal

Court to Supreme Court of Appeal ─ necessity for leave to appeal.

JUDGMENT

FARLAM JA

INTRODUCTION

[1] In this matter the applicants, a corporation exporting soda ash from the United States of America and its local distributor, seek an order declaring that they are entitled to note an appeal against a judgment of the Competition Appeal Court directly to this Court, alternatively to apply to this Court for leave to appeal against the judgment and, if leave is granted, to note an appeal against the judgment to this Court. In the further alternative they seek directions in regard to the prosecution and conduct of their appeal against the judgment.

[2] The judgment of the Competition Appeal Court which the applicants wish to take on appeal to this Court was delivered on 24 October 2002 by Malan AJA, with whom Davis JP and Jali JA concurred. In it Malan AJA dismissed the applicants' appeal against a decision of the Competition Tribunal delivered on 30 November 2001 in which it was held (1) that jurisdiction under s 3(1) of the Competition Act 89 of 1998 (to which I shall hereinafter refer as 'the Act') can be based on any effect, within the meaning of the Act, within South Africa, whether non-competitive or pro-competitive; (2) that any agreement among firms having a provision setting prices is a restrictive horizontal practice within the contemplation of s 4(1)(b) of the Act and *per se* unlawful; and (3) that the second and third respondents, an exporter of soda ash to this country, Botswana Ash (Pty) Ltd, and its local distributor, Chemserve Technical Products (Pty) Ltd, had the required *locus standi* to seek an order from the Competition Tribunal interdicting the first applicant from engaging in the alleged restrictive horizontal practice, despite the absence of an allegation that they were adversely affected by the first

applicant's conduct. In its decision on the *locus standi* ground the Competition Appeal Court relied on ss 49B, 49C and 53 for its conclusion that the second and third respondents had *locus standi.*

[3] In the notice filed on behalf of the two applicants in this Court the applicants purported to appeal against the Competition Appeal Court's judgment in respect of all three grounds. (In what follows I shall call these grounds 'the section 3 ground', 'the section 4(1)(b) ground' and 'the *locus standi* ground'.) At no stage have they approached the Competition Appeal Court for leave to appeal against its judgment on any of the grounds.

RELEVANT STATUTORY PROVISIONS

[4] Before the contentions of the parties are dealt with it is appropriate to set out certain provisions of the Act as it has been amended, *inter alia*, by Act 39 of 2000. The relevant provisions are the definition of 'complainant' in s 1(1), ss 3(1) (which is to be found in chapter 1 of the Act), 4(1) (which is to be found in chapter 2 of the Act), 49B, 49C, 53, 62 and 63 (which are to be found in chapter 5 of the Act) as well as ss 165(1), 166 and 168(3) of the Constitution, Act 108 of 1986.

The definition of 'complainant' in s 1(1) reads:

'(1) In this Act ─

. . .

"complainant" means a person who has submitted a complaint in terms of section 49B(2)(b)'.

Section 3(1) of the Act reads:

'(1) This Act applies to all economic activity within or having an effect within, the Republic, except ─

(a) collective bargaining within the meaning of section 23 of the Constitution and the 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) ... [which were deleted by s 2(a) of Act 39 of 2000].'

Section 4(1), which deals with restrictive horizontal practices, reads [as amended by s 3(b) of Act 39 of 2000]:

'(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if ─

(a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or

(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; or
(iii) collusive tendering.'

Sections 49B and 49C are part of Part C of chapter 5.

Section 49B [which was inserted in the Act by s 15 of Act 39 of 2000], as far as is material, reads:

'(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.'

Section 49C [which was also inserted in the Act by s 15 of Act 39 of 2000], as far as is material, reads:

'(1) At any time, whether or not a hearing has commenced into an alleged prohibited practice, the complainant may apply to the Competition Tribunal for an interim order in respect of the alleged practice.

(2) The Competition Tribunal ─
(a) must give the respondent a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and

(b) may grant an interim order if it is reasonable and just to do so, having regard to the following factors:
(i) The evidence relating to the alleged prohibited practice;
(ii) the need to prevent serious or irreparable damage to the applicant; and
(iii) the balance of convenience.'

Section 53 [which was substituted by s 15 of Act 39 of 2000] deals with the right to participate in a hearing. As far as is material it reads:

'The following persons may participate in a hearing, in person or through a representative, ...

(a) If the hearing is in terms of Part C ─

(i) the Commissioner, or any person appointed by the Commissioner;
(ii) the complainant, if ─
(aa) the complainant referred the complaint to the Competition Tribunal;
or
(bb) in the opinion of the presiding member of the Competition Tribunal, the complainant's interest is not adequately represented by another participant, and then only to the extent required for the complainant's interest to be adequately represented;

. . .

(iii) the respondent; and
(iv) any other person who has a material interest ....'

Section 62, as substituted by section 15 of Act 39 of 2000, reads:

'(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
(ii) a review of a certificate issued by the Minister of Finance in terms of section 18(2); and

(b) the functions referred to in sections 21(1), 27(1) and 37, other than a question or matter referred to in subsection (2).

(2) In addition to any other jurisdiction granted in this Act to the Competition Appeal Court, the Court has jurisdiction over ─

(a) the question whether an action taken or proposed to be taken by the Competition Commission or the Competition Tribunal is within their respective jurisdictions in terms of this Act;

(b) any constitutional matter arising in terms of this Act; and

(c) the question whether a matter falls within the exclusive jurisdiction granted under subsection (1).

(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.

(5) For greater certainty, the Competition Tribunal and the Competition Appeal Court have no jurisdiction over the assessment of the amount, and awarding, of damages arising out of a prohibited practice.'

Section 63, as substituted by s 15 of Act 39 of 2000, reads, as far as is material:

'(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;

(b) is not limited by monetary value of the matter in dispute; and
(c) exists even if the matter in dispute is incapable of being valued in money.

(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.

(3) A court granting leave to appeal in terms of this section may attach any appropriate conditions, including a condition that the applicant provide security for the costs of the appeal.

(4) If the Competition Appeal Court, when refusing leave to appeal, made an order of costs against the applicant, the Supreme Court of Appeal or the Constitutional Court may vary that order on granting leave to appeal.

(5) An application to the Competition Appeal Court for leave to appeal must be made in the manner and form required by the Competition Appeal Court Rules.

(6) An application to the Constitutional Court for leave to appeal must be made in the manner and form required by its Rules.

(7) Section 21(1A) to (3)(e) of the Supreme Court Act, 1959 (Act 59 of 1959), read with the changes required by the context, applies to an application to the Supreme Court of Appeal for leave to appeal in terms of this Act.

(8) A person applying to the Supreme Court of Appeal for leave to appeal under this Act must give notice of the application to the registrar of the Competition Appeal Court.'

Section 165(1) of the Constitution provides:

'(1) The judicial authority of the Republic is vested in the courts.'

Section 166 of the Constitution reads:

'The courts are ─

(a) the Constitutional Court;
(b) the Supreme Court of Appeal;
(c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
(d) the Magistrates' Courts; and

(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.'

Section 168(3) of the Constitution reads:

'(3) The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters, and may decide only ─

(a) appeals;
(b) issues connected with appeals; and
(c) any other matter that may be referred to it in circumstances defined by an Act of Parliament.'

THE ORDER REFERRING THE APPLICATION FOR HEARING BEFORE THE COURT

[5] On 25 February 2003 the applicants' application was referred for the hearing of argument before this Court. Paragraph 2 of the order reads as follows:

'Without limitation of the issues on which the parties will be entitled to address arguments to the Court the parties are requested to address submissions on the following issues:

(a) whether the applicants are entitled to appeal to this Court against those portions of the judgment of the Competition Appeal Court in which it was held

(1) that the second and third respondents had *locus standi* to seek an interim interdict against the first applicant and

(2) that the first applicant is not entitled to raise an efficiency defence in respect of the allegations that it had contravened section 4(1)(b) of the Competition Act 89 of 1998;

(b) whether section 62(3)(a) of the Competition Act is constitutional;

(c) whether it is competent for the applicants to note an appeal to or to seek leave to appeal from this Court against those portions of the judgment of the Competition Appeal Court referred to in paragraph (a) above without first seeking the leave of the Competition Appeal Court; and

(d) whether it is appropriate for this Court to consider the matter separately from such appeal as the applicants may wish to bring in terms of section 62(4), read with section

63(2), of the Competition Act in respect of that portion of the judgment of the Competition Appeal Court in which it rejected the applicants' contentions regarding the correct interpretation of section 3(1) of the Competition Act.'

APPLICANTS' SUBMISSIONS

[6] The applicants submitted that all portions of the judgment of the Competition Appeal Court in respect of which they sought leave to appeal implicated directly or indirectly the interpretation and application of Chapters 2, 3 and 5 of the Act and were accordingly matters in respect of which s 62(3)(a) purported to confer final jurisdiction upon the Competition Appeal Court and that s 62(3)(a) purported to oust the jurisdiction of this Court to entertain an appeal against the judgment of the Competition Appeal Court in this matter on any ground. They submitted further that s 62(3)(a) violated s 168(3) of the Constitution because that section conferred jurisdiction to determine appeals in *any* matter on this Court and therefore any attempt to deprive this Court of such jurisdiction is unconstitutional. They submitted that s 63(3)(a) of the Act should therefore be declared invalid.

[7] They proceeded to submit that no procedure for noting an appeal from a judgment of the Competition Appeal Court in circumstances such as the present is provided for in s 62(4), read with s 63 of the Act or at all, and accordingly it is both competent and appropriate for the applicants to seek to note an appeal directly to this Court without seeking leave from the Competition Appeal Court.

FIRST RESPONDENT'S SUBMISSIONS

[8] Counsel for the first respondent, the Competition Commission, submitted that the applicants were not entitled to appeal to this Court in respect of the *locus standi* and section 4 issues as both such issues were within the exclusive jurisdiction of the Competition Appeal Court in respect of which its decision was final in terms of s 62(3)(a) of the Act. This section, so it was submitted, is constitutionally valid and not in conflict with s 168(3) of the Constitution on a proper construction thereof.

[9] Counsel for the first respondent submitted further that the applicants should first have sought leave to appeal from the Competition Appeal Court in respect of all three issues which they wish to bring on appeal. As far as the *locus standi* and section 4 issues were concerned they could and should, so it was contended, have raised the constitutionality of s 62(3)(a) before the Competition Appeal Court, which would have had the power to deal with the point under s 62(2)(b), and its decision on the point, if unfavourable to the applicants, could have been brought before this Court either by way of an appeal in terms of s 62(4), if the Competition Appeal Court gave leave, or by way of an application for leave under s 63(2)(b) if it did not.

[10] Counsel for the first respondent also argued that the application was procedurally defective and irregular because the applicants had failed to seek leave to appeal from the Competition Appeal Court in respect of the section 3 issue. This was because the section 3 and section 4 issues were inextricably linked and could not be adjudicated separately, with the result that it would not be appropriate or convenient for this Court to consider these two issues on a piece-meal basis.

SECOND AND THIRD RESPONDENTS' CONTENTIONS

[11] Counsel for the second and third respondents contended that all three issues in respect of which the applicants seek to attack the Competition Appeal Court judgment fall outside the exclusive and final jurisdiction of the Competition

Appeal Court and can be attacked on appeal before this Court only with the leave of the Competition Appeal Court in terms of s 63(2)(a) or, if such leave is refused (and only after it has been sought), with the leave of this Court.

They contended accordingly that the application should be dismissed because of the applicants' failure first to seek leave to appeal from the Competition Appeal Court.

[12] Counsel for the second and third respondents also submitted that the applicants were seeking to ventilate issues on appeal before this Court which are not appealable. They submitted that the applicants were in effect endeavouring to appeal against a decision dismissing exceptions (such a decision being not appealable: see *Minister of Safety and Security and Another v Hamilton* 2001(3) SA 50 (SCA) and *Maize Board v Tiger Oats Ltd* 2002(5) SA 365(SCA)) and that in any event a decision dismissing a *locus standi* objection 'would not give rise to the granting of leave to appeal': in support of this submission they relied on a *dictum* of Harms JA in *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) at 954J – 955A.

DISCUSSION

[13] It is appropriate to deal first with the contention advanced by counsel for the second and third respondents that the decisions the applicants seek to bring on appeal are not appealable. There is in my view no substance in this contention.

[14] Though the issues in question may have been presented in form as grounds of exception there can be no doubt but that the decisions on such issues will have a final and definitive effect on the main case before the Tribunal. The Competition Appeal Court specifically so held – and rightly so in my view – in relation to the s 4(1)(b) issue (see paragraph [22] of its judgment) and the position is no different in regard to the *locus standi* point. Indeed in the *Kwanonqubela* case, on which counsel for the second and third respondents sought to rely, Harms JA said in terms (at 950E) that a decision on a *locus standi* point is appealable. (The *dictum* at 954I to 955A related to a different question, whether in the circumstances of that case leave to appeal on the *locus standi* point should have been granted before the proceedings had been terminated.)

[15] In my view the objection raised by all three respondents, namely that the present application must be dismissed because the applicants did not first ask the Competition Appeal Court for leave to appeal, was well taken. My reasons for so holding are as follows.

[16] The foundation of the applicants' argument in this Court is their submission that the ouster of this Court's jurisdiction contained in s 62(1) and (3)(a), read with s 62(4), is unconstitutional. But even if one assumes that this contention is correct, this will lead only to the excision from those sub-sections of the provisions giving effect to the ouster. The further provisions in s 62(4) and s 63(2) providing for the necessity for seeking leave to appeal, either from the Competition Appeal Court, or, if it refuses, this Court, cannot be held to be unconstitutional (see *Besserglik v Minister of Trade, Industry and Tourism (Minister of Justice Intervening)* 1996 (4) SA 331 (CC)). The result is that even if the applicants' attack on the constitutionality of the attempted jurisdictional ouster succeeds the need for leave to appeal will remain and will extend, on the excision of the wording complained of, to all appeals from the Competition Appeal Court.

[17] The wording of the statute under consideration here differs from that of item 22 of Schedule 7 of the Labour Relations Act 66 of 1995, which was considered in *Chevron Engineering (Pty) Ltd v Nkambule and Others,* argued together with the present matter. In that case leave to appeal to this Court (from a decision of the Labour Appeal Court) was not required as a pre-requisite to coming to this Court by the Constitution, the Labour Relations Act or the Supreme Court Act 59 of 1959. In the present case it was clearly the intention of Parliament that leave to appeal should be a pre-requisite from an appeal from the Competition Appeal Court to this court and a decision that the jurisdictional ouster was unconstitutional would not alter the position.

[18] It follows that the application for the two declarations sought must fail. The application for directions must suffer the same fate because it cannot be 'just and expedient' for directions to be given regarding the prosecution and conduct of an appeal which is not validly before the Court.

ORDER

[19] The following order is made:

The application is dismissed with costs, such costs to include, in the case of the second and third respondents, those occasioned by the employment of two counsel.

.....

IG FARLAM
JUDGE OF APPEAL

CONCURRING

VIVIER ADP
ZULMAN JA
LEWIS JA
MLAMBO AJA