

REPUBLIC OF SOUTH AFRICA



IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

Reportable:
Of interest to other judges:

30 September 2020

Vally JA

CAC Case No.: 183/CAC/Apr20
CT Case No: CR228DEC18/DSM258FEB19

In the matter between:

Competition Commission

Appellant

and

Shoprite Checkers (Pty) Ltd

First Respondent

Computicket (Pty) Ltd

Second Respondent

JUDGMENT

Vally JA

Introduction

[1] On 18 December 2018 the appellant (Commission) referred a complaint to the Tribunal contending that the first and second respondents, Shoprite Checkers (Pty) Ltd (Shoprite) and Computicket (Pty) Ltd (Computicket) respectively contravened s 8(d)(1)(i) alternatively s 8(c) of the Competition Act 89 of 1998 (the Act).

[2] Shoprite took the view that the complaint against it was legally unsustainable. It took an exception with the Tribunal. In legal parlance this is known as a no cause of action exception. Computicket, too, took an exception. It complained that the referral of the Commission was vague and embarrassing. This, again in legal jargon, is known as a vague and embarrassing exception. The Commission duly responded, by affidavit, to the exceptions. It denied that it had failed to disclose a cause of action against Shoprite, or that its referral contained vague, unclear or even contradictory averments such that they would cause any pleader to be embarrassed. Shoprite also asked that the case against itself be dismissed.

[3] The Tribunal entertained the exceptions. After giving them careful consideration it upheld both Shoprite's and Computicket's exceptions. It ordered the Commission – it used the word 'must' - to file a supplementary affidavit attending to the criticisms of its case as articulated in the referral affidavit by Shoprite and Computicket. The Order is made up of two parts: one focussed on Shoprite's criticisms and the other on those of Computicket. By ordering the Commission to amend its referral, it refused Shoprite's claim to have the case against it dismissed. The Commission is aggrieved at the conclusion regarding Shoprite's objection, as well as the injunction that it 'must' file a supplementary affidavit to overcome the objection. The Commission has no difficulty with the Tribunal's findings with regard to Computicket's objection. Thus, it seeks that only the part of the Order focussing on the Shoprite case be set aside. Shoprite, too, is aggrieved at the

Tribunal's failure to dismiss the Commission's case against it. However, it recognises that the Commission has not closed the door to it altogether.

[4] The first question raised by the Commission's attempt to appeal the Order is whether it is appealable. Shoprite submits that it is not, but if this court holds that it is, then it cross-appeals against the Tribunal's failure to dismiss the Commission's case against it.

[5] Before examining the case of the Commission it is necessary to record that there is an ancillary application by the Commission for condonation for late filing of record, and for the reinstatement of the appeal. Should we refuse the application that would be the end of the matter. Shoprite and Computicket take the view that condonation should be refused because, they claim, the Commission's case is weak on the merits. However, they agree that the issue of condonation cannot be separated from the merits of the case, and that if we were to find that the Commission has a good case on the merits then the application for condonation should be granted and vice versa – if it has a bad case on the merits then the application should be refused.

The Commission's case as articulated in the referral

[6] The spine of the Commission's case is constituted by seven interconnected paragraphs in the referral affidavit. They are lengthy but, given their importance to the determination of the exception, deserving of repetition here. They read:

'Computicket

12. Computicket distributes tickets for entertainment events. Bus travel, flights, hotel accommodation and holiday packages. It does so mainly through the "Money Market" kiosks in certain of Shoprite Checkers' branded supermarkets or stores, namely Shoprite, Checkers, Checkers Hyper and certain USave and House and Home stores. Computicket also operates several stand-alone kiosks, an electronic distribution system through email and cellular networks, a call centre and a website.
13. Computicket has two types of customers, namely inventory providers (that enter into the exclusive agreements detailed below) and end-consumers who purchase tickets from Computicket.

Shoprite Checkers

14. The primary business of Shoprite Checkers is the retailing of food, liquor, household products, furniture and pharmaceuticals to consumers of all income levels. It does this through the following brands: Shoprite, Checkers, Checkers Hyper, USave, OK Furniture, MediRite, House and Home, Shoprite LiquorShop and Checkers LiquorShop.

CONDUCT APPLIES TO BOTH RESPONDENTS

15. For purposes of the Computicket referral, with regard to the conduct described in detail below, Computicket and Shoprite Checkers are liable for the contravention of section 8(d)(i), alternatively 8(c), of the Act because:
 - 15.1 Both Computicket and Shoprite Checkers were involved in the impugned conduct; alternatively
 - 15.2 Shoprite Checkers exercised decisive influence over the decisions of Computicket during the relevant period, whereas Computicket did not decide its own market conduct independently, but rather operated in accordance with the will of Shoprite Checkers, its parent company.
16. Shoprite Checkers was involved in the impugned conduct, alternatively exercised decisive influence over the market conduct of Computicket, because, *inter alia*:
 - 16.1 Shoprite Checkers acquired Computicket in 2005 and implemented a strategy in terms of which Computicket

would be fully integrated into the value chain of Shoprite Checkers;

- 16.2 Mr Gerhard Hayes ("Mr Hayes"), the general manager of Shoprite Checkers' Value Added Services Division at the relevant time, was tasked with implementing Shoprite Checkers' strategy in relation to Computicket and to this effect was also, in addition to his position at Shoprite Checkers, appointed as Chief Executive Officer of Computicket in 2007. He was appointed to the Shoprite Checkers board of directors in 2009;
- 16.3 The business of Computicket is fully integrated into the supply chain of Shoprite Checkers through *inter alia* the physical presence of Computicket's distribution network in the retail stores of Shoprite Checkers;
- 16.4 Shoprite Checkers played a key role in requiring that Computicket must contain the offending exclusivity clauses in its agreements with inventory providers and that the duration of the agreements should be a period of three years;
- 16.5 Shoprite Checkers was central to enforcing Computicket's exclusive agreements in the event that inventory providers did not adhere to the exclusivity requirements;
- 16.6 Decision making in relation to negotiations with inventory providers was shared between Computicket and Shoprite Checkers;
- 16.7 Shoprite Checkers was aware, endorsed and encouraged the conduct, described in detail below, which gave rise to the contravention of the Act;
- 16.8 The Shoprite strategy implemented by Mr Hayes in respect of Computicket remained in place even after it left Computicket; and,
- 16.9 There are further significant structural links between Shoprite Checkers and Computicket. As indicated Computicket is a 100% wholly owned subsidiary of the Shoprite Checkers and Shoprite Checkers is a wholly owned subsidiary of Shoprite Holdings. The same two individuals, Jacob Basson and Marius Basson, are the

members of the Board of Directors of Computicket and Shoprite Holdings at the relevant time. Mr Bosman was also a director of Shoprite Checkers at the relevant time. Mr Peter Christian Engelbrecht and Mr Carel Genis Goosen were directors of Computicket, Shoprite Checkers and Shoprite Holdings during the relevant period.

17. As such, the conduct which gives rise to the contraventions detailed herein implicates both Computicket and Shoprite Checkers. For the sake of clarity, it is Computicket which is alleged to be dominant in the relevant market and not Shoprite Checkers. It is nevertheless submitted that Shoprite Checkers is also liable for the contravention of section 8(d)(i), alternatively 8(c) of the Act for, *inter alia*, the reasons indicated above.
18. Where I thus make reference to Computicket in describing the conduct, it should be read to refer to both of the Respondents, unless the context demands otherwise.'

[7] The Commission maintains that the contents of these paragraphs demonstrate that it is relying on the doctrine of a Single Economic Activity (SEE) with the SEE being the dominant firm. There is, however, no direct reference to an SEE or to a dominant firm in the referral. It contends that the doctrine is a conclusion of law, which can be reached on the pleaded facts. Its case is that the contents of sub-paragraph 15.2, as well as other sub-paragraphs in the referral affidavit where the same or a similar allegation of fact is made, demonstrate that it is relying on the doctrine. This, it says, is indubitably clear to anyone who reads the pleaded facts: they clearly demonstrate that the two entities are so intertwined as to be indistinguishable when pursuing and carrying out the impugned conduct. This SEE (Computicket and Shoprite combined for purposes of the impugned conduct)

constitute a 'firm' as defined in the Act, and understood in the common law arising from judgments of this court.

Paragraphs in the body of the decision and the Order

[8] After hearing the parties the Tribunal issued its 'Reasons for Decision' (Decision). There are two paragraphs in body of the Decision that caused great consternation to the Commission. They lie at the core of the Commission's appeal. They are to be found at [28] and [36] of the Decision. They read, respectively:

[28] In all the cases cited above, the firms were accused of horizontal restrictive practises in terms of section 4. In the matter before us, the 2018 referral concerns a section 8 contravention. We must ask the question whether it would be appropriate to apply the doctrine, normally relied on and applied in horizontal restrictive practice cases, to an abuse of dominance case? In our view, no. The reading of section 4(5) clearly applies to agreements or concerted practices in the context and framework of section 4(1), as subsection 4(5) reads "*the provisions of subsection (1) do not apply to an agreement between, or concerted practice ...*" If the application were intended for section 8, the legislature would have indicated such an intention clearly, by inserting a similar provision to section 4(5) under section 8.

[36] In our view, in light of the law outlined above, that Computicket and Shoprite Checkers are separate economic entities and should therefore be treated as such in respect of the allegations contained in the Commission's complaint.' (Underlining added.)

[9] While the Commission only drew attention to [28] and [36], the next paragraph, [37], is equally important. Here the Tribunal deals with (i) whether Shoprite (not Shoprite and Computicket together) is a dominant firm; and (ii)

why it found the Commission's referral to the problematic. The relevant part of the paragraph reads:

[37] With regards to the issue of dominance, the Commission conceded that Shoprite Checkers is not active in the market for outsourced ticketing services to inventory providers in which Computicket is active. Unsurprisingly, no market shares attributable to Shoprite Checkers are reflected anywhere in the Commission's referral. It simply is unclear what we are to make of the allegations against Shoprite Checkers.'

[10] In the rest of the paragraph the Tribunal makes very clear what it found and what it expects of the Commission:

'Given that the Commission's reliance on the single economic entity doctrine fails and the question of dominance is abundantly opaque, the Commission must rectify the referral to properly reflect and clarify the case against Shoprite Checkers in order for it to meet the case put against it.'

[11] In this, the second part of the paragraph, the Tribunal leaves no doubt as to what it found: the pleaded facts failed to establish that Computicket and Shoprite constituted an SEE. And, the issue of a dominant firm is assessed solely with regard to Shoprite and not with regard to the combined role, effort or conduct of Computicket and Shoprite. It took no note of the allegations in paragraphs 15 and 16 of the referral affidavit quoted in [6] above - which must be accepted as proven - that the two were incestuously connected for purposes of carrying out the impugned conduct. The cause for this lies in paragraph 17 of the referral affidavit. Here the Commission confounded its own case. In this paragraph the Commission focussed on the separate roles of Computicket and Shoprite and specified that 'it is Computicket which is alleged to be dominant in the relevant market and not Shoprite Checkers.' With this

avermment it appears to disown its case that they constituted an SEE, which was a dominant firm. In the circumstances, it is no surprise that the Tribunal dealt with its case in the manner that it did. The Commission did itself no favours by pursuing a case that the two entities combined constitute a dominant firm and then unnecessarily making reference to the separate position of each, particularly Shoprite. This served to sow confusion about its case, which confusion infected the decision. In my view the Commission should have spelt out (i) what it means by an SEE, (ii) why Computicket and Shoprite constitute an SEE and (iii) why and how the SEE is a dominant firm.

[12] It is clear from the findings – I used the word advisedly – that the concept of a legal entity loomed large in the Tribunal's consideration. It is on the basis of that concept that it came to find that there was no SEE. The concept of a legal entity was conflated with the economic doctrine SEE. Therein lies the substance to the Commission's complaint against [28] and [36] of the Decision.

[13] The Order, it will be recalled, required the Commission to file a supplementary affidavit attending to the complaint of Shoprite. It did not, as asked for by Shoprite, dismiss the claim against Shoprite. The full terms of the Order with regard to Shoprite reads:

- '[1] The Shoprite Checkers (Pty) Ltd dismissal application and exception application are upheld in the following respects:
- [1.1] Within thirty (30) business days of this order, the Commission must file a supplementary referral affidavit to the Complaint Referral to cure the defects in the Complaint Referral in respect of the allegations against

Shoprite Checkers (Pty) Ltd by complying with the provisions of Tribunal Rule 15(2), failing which the applicants in this matter are given leave to approach the Tribunal for an order that the Complaint Referral in so far as it relates to Shoprite Checkers (Pty) Ltd be dismissed.'

[14] There is no link between the first sentence and the rest of the Order. At the end of the first sentence, the parties would be expecting to learn in what respects Shoprite's 'dismissal application and exception application' are upheld. Instead they are told that 'the Commission must file a supplementary referral affidavit to the Complaint Referral to cure the defects in the Complaint Referral in respect of the allegations of Shoprite.' This part of the Order cannot be separated from [28], [36] and [37] of the Decision. Put differently, if [28], [36] and [37] were amputated from the Decision this part of the Order would not only lack foundation but would actually make no sense, argues the Commission.

Is the Order appealable?

[15] Section 37(1)(b) read with section 61(1) of the Act empowers this court to entertain any appeal against any decision of the Tribunal that is 'final', save for an 'order' that is made with the consent of the parties.¹ It is instructive to note that the Act uses the terms 'decision' and 'order' in the same sentence: a 'decision' and an 'order' is really a distinction without a difference.² The decision or the order must be final though to be appealable.

¹ Section 37(1)(b)(i)

² *Heyman v Yorkshire Insurance Co Ltd* 1964 (1) SA 487 (A) at 492C-493B; *Law Society, Transvaal v Behrman* 1981 (4) SA 538 (A) at 546D-F; *Firststrand Bank Limited t/a First National Bank v Makaleng* [2016] ZASCA 169 (24 November 2016) at [10] – [15]

[16] The section also allows for an appeal against an 'interim or its interlocutory decision' of the Tribunal 'that may, in terms of [the] Act, be taken on appeal.'³ The present Decision is not one of those that may in terms of the Act be taken on appeal. The Order is also not one that was made by consent of the parties. This leaves the issue of whether the Decision of the Tribunal is a 'final' one.

[17] The Appellate Division (now Supreme Court of Appeal (SCA)) in *Zweni*⁴ dealing with section 20 of the Supreme Court Act 59 of 1959, gave guidance as to what a decision or order should state in order to be final. But first it is important to record that even in *Zweni* the court recognised that a decision can be a judgment or order. It said:

'The issue whether a decision is an appealable 'judgment or order' is complicated by a number of factors.'⁵

And that the distinction between 'judgment' and 'order':

'... is formalistic and outdated; it performs no function and ought to be discarded.'⁶

[18] In *Zweni* the court held that a 'judgment or order' is:

'a decision which, as a general principle, has three attributes, first the decision must be final and in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.'⁷

³ Section 37(1)(b)(ii)

⁴ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A)

⁵ Id at 531E

⁶ Id at 532E

⁷ Id at 532I-533A

The three attributes certainly provide a useful guide and should always be the starting point in any analysis focussed on the issue of appealability. It is neither exhaustive nor 'cast in stone.'⁸

[19] In *Telkom*⁹ and in *Loungefoam (1)*¹⁰ this court has adopted the jurisprudence of the SCA as set out in *Zweni*. More recently, this court in *Vexall*¹¹ stated:

"[12] These matters define a somewhat narrow debate, framed largely by the position articulated in *Zweni*. An altogether wider view is to be found in *Scaw*¹², and the principles there articulated by the Constitutional Court. In *Scaw*, the question was how to interpret s167(6)(b) of the Constitution which permits of an appeal directly to the Constitutional Court, when it is in the interests of justice. The Constitutional Court reviewed the jurisprudence of the Supreme Court of Appeal and considered that the appealability of a "judgment or order" should not be confined to the *Zweni* principles, but should extend to the broader concept of what the interests of justice require. What the interests of justice require will depend upon the particular case. *Scaw* emphasizes that irreparable harm occasioned by the interim order, if leave to appeal is not granted, is an important consideration in determining the interests of justice. This marks a departure from the more parsimonious position of some of the appellate jurisprudence that does not count the prejudice caused by an interim order to be availing in deciding whether the order is appealable.¹³

[20] Mr Ngukaitobi SC for the Commission submitted that the ratio in *Vexall* represents a shifting of the dial by drawing on the innovation of the

⁸ *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10F-G

⁹ *Telkom SA v Orion Cellular and Others* [2005] 1 CIPLR 113 (CAC)

¹⁰ *Loungefoam v Competition Commission* [2011] ZACZC 4 (6 May 2011) at [20]

¹¹ *Business Connexion v Vexall* [2020] ZACAC 4 (15 July 2020)

¹² *International Trade Administration Commission v Scaw South Africa (Pty) Ltd & Others* 2012(4) SA 618 (CC) See also *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012(6)SA223(CC) at para 25

¹³ *Cronshaw & another v Fidelity Guards Holdings (Pty) Ltd* 1996 (3) SA 686 (A)

Constitutional Court, which places the concept 'interests of justice' at the centre of the enquiry on appealability of an order or decision. He invited us to hold that an appeal should not only be entertained in cases where a final order or decision has been made, but also in cases where an interlocutory decision or order is issued, if the 'interests of justice' so requires. Since the terms of the order was not 'final' he submitted that it would, in the light of [28] and [36] of the Decision, be in the interests of justice to entertain and uphold the appeal. The interests of justice test has been described as the 'equitable and more context-sensitive standard'.¹⁴ Both the *Zweni* and the interests of justice tests are fact-specific. The interests of justice test has not made the requirement of the attributes referred to in *Zweni* redundant. The differences between the two tests should not be exaggerated. The interests of justice test merely makes allowance for a situation where one or more of the attributes referred to in *Zweni* may be absent, or if there are other attributes that stand out such as on-going harm to the appellant caused by the interim order. The interests of justice test has certainly not opened the sluice-gate allowing for all interim orders to flow freely to the appeal court. That said, based on the conclusion I arrive at in this case, there is no need to have recourse to the interests of justice test.

[21] The Commission submitted that [28] and [36] of the Tribunal's Decision constitute definitive final decisions, which cannot be reversed by the Tribunal.

¹⁴ *Philani-Ma-Afrika v Mailula & others* 2010 (2) SA 573 (SCA) at [20]

[22] Mr Trengove SC, for Shoprite, relying on the phrase 'in our view' in both paragraphs, stressed that they are mere opinions or reasons for the Order and therefore fall outside the scope of an appeal. Incorrect opinions and reasons do not provide for an appeal. Building on the argument, he emphasised that the terms of the Order are patent. The Commission is allowed to amend its referral, should it be advised or wished to do so. It could elect to stand by the referral in its present form and request the Tribunal to deal with the matter once again. In that case the referral 'remains unaltered and the relief asked' therein 'remains for adjudication.'¹⁵ If this time the Tribunal dismisses the case of the Commission, it can appeal to this court. Until that occurs the road to an appeal remains closed. The focus in this argument is on the Order – the contents of [28] and [36] of the Decision having been dismissed as 'mere opinions' or 'reasons'.

[23] It is correct and in fact uncontroversial that the Commission's complaint can only be directed at a final order or decision, and not at the reasons for the order or decision,¹⁶ for this court to entertain it. But, the controversy in this case revolves around the question: what is the Order or the Decision? We know that - in terms of [28], [36] and [37] of the Decision – the exception is upheld and that – in terms of the Order – the Commission is afforded an opportunity to amend its case.

¹⁵ *Nxaba v Nxaba* 1926 AD 392 at 394

¹⁶ *Neotel (Pty) Ltd v Telkom SA Soc Ltd and Others* (605/2016) [2017] ZASCA 47 (31 March 2017) at [13]

[24] It is common to find phrases such as: 'in my view'; 'in my judgment'; 'I hold' and 'I conclude' in decisions of tribunals and judgments of a court. The phrase is often followed up with a definitive statement. They are often found after the author has engaged with the facts, the submissions of the parties and the law. In some cases the phrase and accompanying statement come even before the tribunal or court has engaged with the facts, submissions of the parties and the law. In either event, the statement following the phrase could constitute the final decision.

[25] There is little doubt that the effect of the Order viewed independently of [28], [36] and second sentence of [37] of the Decision is such that the case of the Commission has neither been dismissed nor upheld. There has been no 'definitive and distinct relief'¹⁷ granted to the Commission or Shoprite and no final pronouncement of the rights of either of these parties. However, [28], [36] read with the second sentence of [37] of the Tribunal's Decision all have the attributes of a final decision or order. They are not open to reversal by the Tribunal. Thus, while the Commission is afforded an opportunity to amend the referral, it cannot any longer present a case that Computicket and Shoprite constitute an SEE, which is a dominant firm. Its case that this SEE has contravened sections 8(1)(d)(i) or (c) of the Act by concluding agreements with its customers, precluding them from dealing with its competitors is, as far as the Tribunal is concerned, doomed to failure. Its case, however recrafted, which re-iterates the same facts and calls on the Tribunal to draw the same conclusion, by dint of the findings in [28] and [36], has effectively been

¹⁷ *Dickinson and Another v Fisher's Executors* 1914 AD 424 and 427

dismissed. The contents of [28] and [36] read with [37] are unambiguously clear. In [28] the Tribunal definitively finds that the concept of an SEE is restricted to 'horizontal restrictive practises in terms of section 4' and is not applicable to 'an abuse of dominance case' reference in section 8 of the Act. In [36] the Tribunal rejects the contention of the Commission that Computicket and Shoprite constitute an SEE. Instead it finds that Computicket and Shoprite 'are separate economic entities and should therefore be treated as such in respect of the allegations contained in the Commission's complaint.' These are unequivocal findings against the Commission.

[26] Given the firm and uncompromising language used in [28], [36] and [37] they are, I conclude, definitive final findings. The Commission is not able to alter them. They are, therefore appealable. There is another reason why they are appealable. The Commission is not able to make out the case it intends to without repeating the very averments that have been rejected by the Tribunal. The opportunity being afforded to the Commission to amend its case is illusory. The *dictum* of Zondi JA is in point here:

'However, when an exception is upheld on the ground that the particulars of claim does not disclose a cause of action and the plaintiff is granted leave to amend, whether or not the order is final would depend on whether it is capable of being amended.'¹⁸

[27] The findings in [28] and [36] were not carried over into the Order. Once it was found that it was not possible to rely on the doctrine of SEE to hold Shoprite accountable for the alleged unlawful conduct, the Commission's case

¹⁸ *Tshiaeneo Sybil Ramatsimbila v Dr Nkhelebeni Phaswana* [2014] ZASCA 117 (19 September 2014) at [4]

as against Shoprite was effectively dismissed. That this finding was not carried into the Order does not detract from the finality of the effect of the findings.

Should the appeal succeed?

[28] The case of the Commission is that while the doctrine of an SEE is only explicitly recognised in section 4(5) of the Act, it could and should apply with equal force in an abuse of dominance case under section 8 of the Act. It calls for the common law to be developed to allow for this. With resounding scholarly precision it makes copious reference to the jurisprudence of the European Court of Justice to support its case. The pleaded facts certainly allow for such a case to be made. Whether the case is compelling is not for us to say at this stage.

[29] The finding of the Tribunal that no SEE and no section 8 contravention could be established on the pleaded facts is wrong. The pleaded facts (given that the Tribunal had no difficulty with there being no reference to an SEE or firm) certainly allow for the Commission to pursue the case for the development of our law based on the learnings from international jurisprudence, especially that of the European Union (EU). Once the Tribunal saw no difficulty with the Commission's failure to make reference to an SEE and to the combined entity as a dominant firm it would have had to (i) find that the pleaded facts discloses a cause of action, (ii) dismiss Shoprite's exception, and (iii) order Shoprite to plead to the referral. The determination as to whether Computicket and Shoprite could be held liable for a section 8

contravention would only be made after a full hearing was held before the Tribunal, and the facts and the complex legal issues maturely and thoughtfully considered. Accordingly, the findings in [28] and [36] constitute a misdirection which can only be remedied by being set aside. Recalling that these findings were not carried over into the Order, it is necessary to consider whether the Order itself should be set aside once they are amputated from the Decision. In my judgment, not so. The Commission must clearly and unambiguously plead that it relies on the doctrine of SEE, that the SEE constitutes a firm as defined in the Act and the common law, and that it is dominant in the relevant market. By so doing the Commission would, as it must, attend to the ambiguity in paragraph 17 - identified and discussed in [11] above - of its referral affidavit. Allowing the Order to stand would enable the Commission to attend to these issues. Thus, I reject the Commission's submission that amputating [28], [36] and [37] of the Decision would ineluctably lead to the conclusion that the Order must be set aside.

The conditional cross-appeal

[30] Shoprite's exception is based on the averment in the referral affidavit which concedes that it is not a dominant firm in the relevant market. In fact, it is accepted in the referral affidavit that Shoprite does not even operate in the relevant market. Understandably so, there is no allegation that it required its own customers to deal with its own competitors. The case against it is that it was an accessory to the dominant firm's - Computicket's - contravention. Section 8 of the Act does not allow for accessory liability. The case against it,

therefore, has to be dismissed. Shoprite further contended that the SEE doctrine is only applicable to a section 4 contravention and not a section 8 one. The Commission's attempt to invoke the doctrine solely for purposes of holding it liable for its subsidiary's (Computicket) contravention is bad in law. These were the very contentions it made before the Tribunal. They were upheld, but the Order it sought – a dismissal of the claim as against it - was not granted. It asks that we uphold the cross-appeal and dismiss the claim against it.

[31] For the reasons set out in [29] and [30] above, I find that there is no merit in the cross-appeal. Accordingly, it fails.

[32] In the result the following Order is made

- a. The delay in filing the record of the appeal is condoned and the appeal is reinstated.
- b. The appeal is upheld in the following respects:
 - i. The findings in [28], [36] and [37] of the Reasons for the Decision of the Tribunal are set aside.
- c. The appeal as regards Order [1] is dismissed.
- d. The conditional cross-appeal is dismissed.
- e. Each party is to pay its own costs.

"

 Vally JA

Judge: Competition Appeal Court
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I concur



Mnguni JA

Judge: Competition Appeal Court

Date of hearing:	11 September 2020
Date of judgment:	27 October 2020
For the Appellant:	T Ngukaitobi SC
Instructed by:	Competition Commission
For the Respondent:	W Trengove SC with M Engelbrecht SC and K Premhid
Instructed by:	Werksmans Attorneys