THE COMPETITION APPEAL COURT OF SOUTH AFRICA

(SITTING IN CAPE TOWN)

In the matter between 135/CAC/Jan15

ALLENS MESHCO (PTY) LTD	**FIRST APPELLANT**
HENDOK (PTY) LTD	**SECOND APPELLANT**
WIRE FORCE (PTY) LTD	**THIRD APPELLANT**
AGRI WIRES (PTY) LTD	**FOURTH APPELLANT**
AGRI WIRE NORTH (PTY) LTD	**FIFTH APPELLANT**
AGRI WIRE UPINGTON (PTY) LTD	**SIXTH APPELLANT**
CAPE WIRE (PTY) LTD	**SEVENTH APPELLANT**
FOREST WIRE (PTY) LTD	**EIGHTH APPELLANT**
INDEPENDENT GALVANISING (PTY) LTD	**NINTH APPELLANT**
ASSOCIATE WIRE INDUSTRIES (PTY) LTD t/a MESHRITE	**TENTH APPELLANT**

and

COMPETITION COMMISSION	**FIRST RESPONDENT**
CAPE GATE (PTY) LTD	**SECOND RESPONDENT**
CONSOLIDATED WIRE INDUSTRIES	**THIRD RESPONDENT**

And in the intervention applications between

MONDI LTD	**FIRST INTERVENER**

SAPPI SOUTHERN AFRICA LTD	**SECOND INTERVENER**

and

ALLENS MESHCO (PTY) LTD	**FIRST RESPONDENT**
HENDOK (PTY) LTD	**SECOND RESPONDENT**
WIRE FORCE (PTY) LTD	**THIRD RESPONDENT**
AGRI WIRES (PTY) LTD	**FOURTH RESPONDENT**
AGRI WIRE NORTH (PTY) LTD	**FIFTH RESPONDENT**
AGRI WIRE UPINGTON (PTY) LTD	**SIXTH RESPONDENT**
CAPE WIRE (PTY) LTD	**SEVENTH RESPONDENT**
FOREST WIRE (PTY) LTD	**EIGHTH RESPONDENT**
INDEPENDENT GALVANISING (PTY) LTD	**NINTH RESPONDENT**
ASSOCIATE WIRE INDUSTRIES (PTY) LTD t/a MESHRITE	**TENTH RESPONDENT**
COMPETITION COMMISSION	**ELEVENTH RESPONDENT**
CAPE GATE (PTY) LTD	**TWELFTH RESPONDENT**
CONSOLIDATED WIRE INDUSTRIES	**THIRTEENTH RESPONDENT**

Coram: DAVIS JP, VICTOR AJA & ROGERS AJA

Heard: **23 MARCH 2015**

Delivered: **26 MARCH 2015**

JUDGMENT

ROGERS AJA (DAVIS JP & VICTOR AJA concurring):

[1] The appellants (to whom I shall refer collectively as 'AMG') appeal against a decision by the Tribunal on 22 January 2015 refusing to stay the hearing of complaint proceedings pending the delivery of judgement in review proceedings instituted by AMG in the North Gauteng High Court ('NGHC'). The first respondent in the appeal ('the Commission') is the party which referred the complaint to the Tribunal. The second respondent in the appeal ('Cape Gate') is one of the respondents in the referral proceedings. The AMG entities are the other respondents in those proceedings.

[2] In reaction to supplementary heads of argument filed by the Commission, Mondi Ltd ('Mondi') and Sappi Southern Africa Ltd ('Sappi') filed intervention applications to be allowed to participate in the appeal. These companies are not involved in the complaint proceedings giving rise to the appeal.

[3] The Commission initiated the complaint on 14 July 2009 and referred it to the Tribunal on 7 September 2009. The Commission alleges that AMG and Cape Gate, as firms engaged in the manufacture and distribution of wire and wire-related products, participated in price-fixing, market division and collusive tendering over the period 2001 to 2008 in violation of s 4(1)(b) of the Competition Act 89 of 1998 ('the Act'). It is a matter of concern that, more than five and a half years after the referral, the hearing on the merits has not begun in the Tribunal. Cartel cases are difficult enough without adding failing memory to the challenges.

[4] The procedural background is briefly the following. On 28 August 2008 the Commission, in accordance with its Corporate Leniency Policy ('CLP'), granted Consolidated Wire Industries (Pty) Ltd ('CWI') conditional immunity in relation to the matters subsequently referred to the Tribunal. Prior to this date AMG had applied for leniency but was informed that another firm was 'first through the door'. On 19 September 2008 the Commission notified AMG that its leniency application was second in line and would be reconsidered if the first leniency applicant (CWI, though its identity was not disclosed at that stage) failed to comply with the conditions of immunity. As mentioned, on 7 September 2009 the Commission referred the complaint to the Tribunal.

[5] On 8 May 2010 two of the AMG entities (to whom I shall refer collectively as 'Agri Wire') launched review proceedings in the NGHC in which they sought the setting aside of the Commission's grant of immunity to CWI and declaring unlawful and inadmissible the evidence obtained by the Commission from CWI in exchange for immunity ('the first review'). Agri Wire's case was that the CLP was unlawful. The Commission opposed the first review.

[6] During July 2010 AMG and Cape Gate filed answering affidavits in the complaint proceedings. It is not clear why ten months for this exercise were taken or allowed. AMG thereafter applied to the Tribunal to stay the referral proceedings pending a determination of the first review. The Tribunal granted the stay on 28 March 2011.

[7] On 5 July 2011 the NGHC dismissed the first review.[1] The Supreme Court of Appeal dismissed an appeal on 27 September 2012.[2] On 1 November 2012 the Constitutional Court dismissed an application for leave to pursue a further appeal by way of an order recording that there were no reasonable prospects of success.

[8] On 15 May 2013, by which time nothing further seems to have happened in the referral, AMG launched another review application in the NGHC, this time seeking to set aside the Commission's refusal to grant AMG leniency ('the second review'). AMG's case on this occasion was that the Commission had refused leniency on the incorrect basis that the CLP precluded it from granting leniency to a firm which was 'second through the door'. The Commission opposed the second review.

[9] In the meanwhile the Tribunal held a pre-hearing conference on 16 July 2013. The pending review was apparently not mentioned. On 17 February 2014 AMG's attorneys wrote to the Commission suggesting that the parties meet to discuss the implications of the second review, given that the review might not be determined before the referral hearing began. The Commission's response was that the review and referral proceedings were distinct and could run independently of each other.

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[1] [2011] ZAGPPHC 117.
[2] [2012] 4 All SA 365 (SCA); 2013 (5) SA 484 (SCA).

The Commission's view was that, if the second review succeeded and if thereafter the Commission were to grant AMG leniency, the Tribunal was nevertheless entitled to determine whether or not AMG had contravened s 4(1)(b) though a fine could not be imposed.

[10] On 23 April 2014 the Commission wrote to the attorneys for the respondent firms, including AMG, recording the agreement that the referral hearing would run from 22 January 2015 to 4 February 2015.

[11] The second review was argued before Rabie J on 15 September 2014. He reserved judgement. His judgement has not yet been delivered.

[12] The Tribunal held a further pre-hearing conference on 19 November 2014. There was still consensus among the parties that the hearing would start on 22 January 2015.

[13] On 13 January 2015 AMG's attorneys wrote to the Commission and Cape Gate's attorneys, proposing that the referral hearing be stayed because Rabie J had not yet delivered judgement. The Commission disagreed. On the following day AMG delivered a stay application for hearing by the Tribunal on Monday 19 January 2015. The Commission filed its opposing affidavit on the Monday. The Tribunal directed that the parties argue the stay at the start of the referral hearing on Thursday 22 January 2015. After hearing argument on that day, the Tribunal adjourned for a short while. On resumption the Chairperson announced that the panel had discussed the matter and that its decision was to dismiss the application for a stay.

[14] What one might then have expected was for the hearing to begin forthwith or at least on the following day (Friday 23 January 2015). Instead, agreement was reached to resume on Monday 26 January 2015 with opening statements and the first witness. On 23 January 2015 AMG filed a notice of appeal against the refusal of the stay. On the Monday there was further discussion, on and off the record, the upshot of which was that by agreement the referral hearing was postponed pending the determination of an expedited appeal by AMG to this Court.

[15] Subsequently the President of this Court gave directions for the hearing of the appeal on 23 March 2015. By 5 February 2015 AMG (represented by Mr Geach SC), the Commission (represented by Mr Maenetje SC leading Ms Lekokotla) and Cape Gate (represented by Mr Campbell SC leading Mr Makola) had filed their heads of argument. As one would expect, they made submissions directed to the particular facts and circumstances of the case (though, as will appear, they failed to deal with one important threshold issue)

[16] On 27 January 2015 the Commission filed supplementary heads of argument, this time represented by Mr Marcus SC leading Ms Steinberg and Ms Goodman. In the supplementary heads the Commission, through counsel, expressed its frustration at constant challenges to its decisions by way of review proceedings, challenges which, in the Commission view, were often an abuse with no purpose other than delay. After a wide-ranging survey of authorities on abuse of process and the principles applicable to reviews, including reviews in medias res, the Commission's counsel submitted that it would be appropriate for this Court to 'lay down the following guidelines', namely:[3]

'1. Where the decision [*viz of the Commission*] in question is one which does not affect rights, or is of a preliminary nature, it will not fall within the definition of PAJA[4] and will thus not be reviewable under PAJA.

2. Where the decision in question does constitute administrative action, it will, in general, not be reviewable, unless the applicant, who bears the onus, is able to establish:

(a) prejudice;

(b) exceptional circumstances justifying review;

(c) that it has exhausted all internal remedies.

3. A decision which does not affect rights or is of a preliminary nature, will be reviewable under the principle of legality but generally the applicant in such a case is required to discharge the onus of showing –

(a) exceptional circumstances such as ill-faith, oppression or vexation;

(b) why the matter cannot be resolved in the ordinary course by the Tribunal;

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[3] I have renumbered the proposed guidelines set out in paras 4.1.1 to 4.1.4 of the Commission's supplementary heads.
[4] The Promotion of Administrative Justice Act 3 of 2000.

(c) that it has exhausted all alternative remedies.

4. In general, preliminary litigation relating to competition matters such as the validity of an initiation or a referral – the list is not exhaustive – must be instituted in the Tribunal and subject to the rules referred to above.'

[17] It was the Commission's request for the laying down of these guidelines that prompted Mondi and Sappi to launch their intervention applications on 11 and 18 March 2015 respectively. Their alleged interest arises from the fact that they are parties to pending review proceedings which may be affected by the requested guidelines.

[18] I turn now to the appeal.

[19] AMG invokes this Court's appellate jurisdiction, not its review jurisdiction. Section 61(1) of the Act provides that a person affected by a decision of the Tribunal may appeal to this Court in terms of the Court's rules 'if, in terms of section 37, the Court has jurisdiction to consider that appeal…'. In terms of s 37(1)(b) this Court may

'(b) consider an appeal arising from the Competition Tribunal in respect of –

(i) any of its final decisions other than a consent order made in terms of section 63; or

(ii) any of its interim or interlocutory decisions that may, in terms of this Act, be taken on appeal.'

[20] Counsel for AMG and Cape Gate did not mention the question of appealability in their heads of argument. The Commission's counsel said in para 21 of their heads that in the interests of reaching finality expeditiously they did not take issue with the appealability of the Tribunal's decision and abided this Court's decision in that regard.

[21] The question of appealability goes to our jurisdiction. Even if the parties were agreed that we should hear the appeal, they could not by agreement confer jurisdiction on us.

[22] Section 37(1)(b) draws a distinction between 'final' decisions and 'interim or interlocutory' decisions. In civil practice this distinction is one which has been recognised as a matter of interpretation of the phrase 'judgement or order' in s 20(1) of the recently repealed Supreme Court Act 59 of 1959. Given the language of s 37(1)(b) of the Competition Act, there is every reason to have regard to the civil jurisprudence on this topic and this Court has indeed done so in earlier decisions (*Telkom SA Ltd v Orion Cellular Pty Ltd & Others* [2005] 1 CPLR 113 (CAC) at 119c-i; *Loungefoam (Pty) Ltd & Others v Competition Commission of South Africa & Others* [2011] 1 CPLR 19 (CAC) para 20).

[23] In *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) Harms AJA (as he then was) pointed out that s 20(1) of the Supreme Court Act, unlike its predecessors, did not draw a distinction between 'judgments or orders' on the one hand and 'interlocutory orders' on the other. The distinction was now between 'judgments or orders' (appealable with leave) and decisions which are not 'judgments or orders' (not appealable at all). After reviewing the authorities, he said that a 'judgment or order' is a decision which, as a general principle, has three attributes: (i) the decision must be final in effect and not susceptible of alteration by the court of first instance; (ii) the decision must be definitive of the rights of the parties; (iii) the decision must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. The fact that a decision may cause a party inconvenience or place him at a disadvantage in the litigation which nothing but an appeal can correct is not taken into account in determining appealability. The learned judge of appeal gave, as an example, the exclusion of evidence which hampered a party in proving his case. Depending on the trial court's ultimate decision on the merits, an erroneous ruling on admissibility might be a basis for setting aside the decision on the merits and remitting it to the trial court (532F-533F).

[24] In accordance with the principles laid down in *Zweni*, this Court in *Telkom* held that a decision by the Tribunal that a party to s 49C proceedings produce allegedly confidential documents in terms of s 45(1) was interim or interlocutory in nature as it dealt with a question of procedure which was inextricably limited to the manner in which the primary dispute between the parties would be litigated. The

Court held, further, that there was no provision in the Act which made such an interim order appealable. In *Loungefoam* it was said that ordinarily a decision by the Tribunal to grant or refuse an amendment would be procedural in nature but that in some circumstances the effect of the decision would be to dispose of the substantive rights of the parties. In the latter event the decision will be 'final' within the meaning of s 37(1)(b)(i). In *Loungefoam* the Tribunal's decision allowing the Commission to 'amend' its referral affidavit was found to be an appealable decision because the Tribunal, by allowing the amendment, had finally determined that it had jurisdiction to consider the additional matters which the Commission sought to introduce, in circumstances where the respondent firms contended that the Tribunal had no such jurisdiction in view of the more limited terms of the complaint as initiated by the Commission.

[25] An order refusing a postponement or temporary stay of proceedings does not have any of the attributes of a 'judgment or order' in accordance with our civil jurisprudence. A judge who refuses a postponement might upon further consideration grant it, ie the decision is susceptible of alteration by the same court (that this is unlikely in practice is beside the point). The refusal of the postponement or stay is not definitive of the rights of the parties. The party who has been refused the postponement might nevertheless succeed on the merits. And the refusal of the postponement or stay does not dispose of any portion, let alone a substantial portion, of the relief claimed in the main proceedings.

[26] Thus it was that Conradie J (as he then was) held in *Priday t/a Pride Paving v Rubin* 1992 (3) SA 542 (C) that the refusal of a postponement was not appealable. Even if on appeal the refusal of the postponement were changed to a grant of the postponement, this 'would not serve to advance the resolution of the main dispute between the parties' (at 549B). Where a postponement is refused, the party who sought it might, in the language of *Zweni*, be placed at a disadvantage which nothing but an appeal can remedy but that does not make the decision a 'judgment or order' with the attributes of finality to qualify as such.

[27] This does not mean that the party will never be able to question the refusal of the postponement. If the case on its merits goes against the party who was refused

a postponement, that party may, in an appeal against the decision on the merits, raise as a ground of appeal that the trial court wrongly refused the postponement and that this materially prejudiced the appellant in the conduct of his case. This was precisely the nature of the appeal in one of the leading cases on the principles applicable to postponements, *Myburgh Transport v Botha t/a Is a Truck Bodies* 1991 (3) SA 310 (NmSC). There, following an unsuccessful application by the defendant for a postponement, the defendant's counsel withdrew, whereupon judgment was granted in favour of the plaintiff after the hearing of unchallenged evidence. An appeal against the judgment on the merits succeeded on the ground that the trial judge had erred in his approach to the application for a postponement.

[28] In my opinion, the express language of s 37(1)(b) of the Competition Act makes this an a fortiori conclusion in the present case. The Tribunal could at any time have re-visited the question of a stay. The refusal of the stay was not definitive of the rights of the parties (in the present case, the merits of the alleged cartel behaviour). The refusal of the stay did not dispose of any part of the relief claimed in the main proceedings (an order declaring the implicated firms to have contravened s 4(1)(b) in the manner set forth in the referral affidavit, an order directing them to refrain from such conduct henceforth and the imposition of an administrative fine equal to 10% of their annual turnover for the 2008 financial year). If AMG were to make good the allegations contained in its answering affidavit in the referral proceedings, the Commission's claim for relief against it would be dismissed. The refusal of the stay did not prevent or even inconvenience AMG in advancing its defence.

[29] From this it follows that the Tribunal's refusal of a stay is not a 'final decision' as contemplated in s 37(1)(b)(i). It is an 'interim or interlocutory' decision as that phrase is used in s 37(b)(ii) but there is no provision in the Act to the effect that this particular kind of interim or interlocutory decision – the refusal of a postponement or stay – may be taken on appeal. This Court thus does not have jurisdiction to entertain the appeal.

[30] While the parties may be anxious for us to express an opinion on the merits of the Tribunal's decision to refuse the stay, it would be inappropriate to do so. Our

remarks would inevitably be obiter. Furthermore we do not have the Tribunal's reasons for refusing the stay. It is a remarkable feature of this case that we have been asked to entertain an appeal when we do not know the grounds of the Tribunal's decision (though they might perhaps be inferred from the transcript of the argument addressed to the Tribunal). I hasten to add that I do not say this as a criticism of the Tribunal. It might have been better for the Tribunal to give brief ex tempore reasons. But the Tribunal may have been influenced by the need for a prompt decision and a belief that its reasons would not be of immediate importance. The Tribunal could if necessary, give its reasons for refusing the stay as part of its reasons on the main case. There is no indication that any of the parties requested the Tribunal to give reasons so that they could be included in the appeal record.

[31] Where I do think both the Commission and the Tribunal went astray is in allowing the referral hearing to be postponed pending an urgent appeal to this Court. Quite apart from the fact that the refusal of the stay was not appealable, the Commission's contention in the stay proceedings was that AMG had not made out a case for a stay and that the hearing should commence and run in accordance with timetable previously agreed between the parties. The Tribunal, in refusing the stay, must have agreed with this view. It was self-defeating, in the circumstances, for the Commission to abandon the agreed hearing dates just because AMG filed a notice of appeal. Once the stay was refused on 22 January 2015, the hearing should have started on that day or by the latest the next day. The Commission should not have agreed to a postponement of the hearing pending an urgent appeal and the Tribunal should in any event not have allowed the parties to do so.

[32] The proper course is to strike the appeal from the roll since we do not have jurisdiction. As to costs, none of the parties resisted the appeal on the basis of an absence of jurisdiction, instead addressing the merits. As far as we can tell, they bear equal responsibility for having agreed to hold the Tribunal's proceedings in abeyance pending the conduct of an urgent appeal. They reached their agreement in that regard without appreciating that the Tribunal's decision refusing the stay was not appealable. I thus consider that the parties should bear their own costs.

[33] The Commission's request for guidelines in its supplementary heads of argument is in my view entirely misconceived. Even if the Tribunal's refusal of a stay were appealable, the appeal would not have been concerned with the circumstances in which and procedure by which decisions of the Commission may be taken on review. It is an historical fact that AMG has twice brought review proceedings in the NGHC. The first review has been finally determined. The second review has been argued, the parties have raised whatever points they wished to advance in that forum, and judgment from Rabie J is awaited. Nothing we now do or say can affect the outcome of that review.

[34] It is not the function of a court of law to issue decrees binding on persons at large (*Kayamandi Town Committee v Mkhwaso and Others* 1991 (2) SA 630 (C) at 634B-635E). The judicial function, in contrast with the legislative function, is to determine live disputes between the parties properly before the court. Centuries of experience have also taught that this is the best way to determine and develop the law. Nobody apart from the parties to the present appeal would be bound by anything we say on the matters raised in the supplementary heads (ie our judgment would not be res judicata except as between the parties to this appeal). And of the parties in the present appeal, only the Commission seems to have any interest in asking for guidelines.

[35] The applications by Mondi and Sappi for intervention are likewise misconceived. That they felt moved to seek intervention reflects the inappropriateness of the Commission's request that we lay down guidelines for reviews of the Commission's decisions. But misconceived arguments by a party to litigation does not justify intervention by outsiders. If for any reason it had been necessary and appropriate for us in the present case to decide any of the matters raised in the Commission's supplementary heads, the mere fact that our findings of law might affect other parties in other litigation would not justify their intervention. If it were otherwise, hundreds of litigants could potentially seek intervention in an appeal because it raised a point of law which was relevant to cases in which they were or expected to become involved.

[36] The following order is made:

(a) The applications by Mondi Limited and Sappi Southern Africa Ltd to intervene in the appeal are dismissed.

(b) The appeal is struck from the roll.

(c) The parties to the appeal and the intervening parties are to bear their own costs.

APPEARANCES

For Appellants	Mr BP Geach SC Instructed by: Roestoff & Krause Attorneys Hazelwood Pretoria
For First Respondent	Mr NH Maenetje SC & Ms BD Lekototla And also Mr G Marcus SC and Ms C Steinberg and Ms I Goodman Instructed by: The Competition Commission The dti Campus Building C, Mulayo 77 Meintjies Street Pretoria
For Second Respondent	Messrs J Campbell SC & BL Makola Instructed by:

	Bowman Gilfillan 165 West Street Sandton
For First Intervener (Mondi Ltd)	Mr D Unterhalter SC, Mr S Budlender SC and Ms S Pudifin-Jones Instructed by: Nortons Inc 135 Daisy Street Sandton
For Second Intervener (Sappi Southern Africa Ltd):	Ms K McLean Instructed by Bowman Gilfillan 165 West Street Sandton