THE COMPETITION APPEAL COURT OF SOUTH AFRICA

(SITTING IN CAPE TOWN)

In the matter between Case No: 134/CAC/Jan2015

IAN WALTER BUCHANAN **APPELLANT**

and

THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA **FIRST RESPONDENT**

THE PROFESSIONAL BOARD FOR OPTOMETRY AND DISPENSING OPTICIANS **SECOND RESPONDENT**

Coram: DAVIS JP AND ROGERS AJA & BOQWANA AJA

Heard: **17 JUNE 2015**

Delivered: **22 JUNE 2015**

JUDGMENT

ROGERS AJA (DAVIS JP & BOQWANA AJA concurring):

Introduction

[1] The appellant ('Buchanan') is the chief executive officer of a firm known as Torga Optical, a franchisor whose franchisees conduct optometry practices. The business was established by his late wife who was a qualified and registered optometrist. She passed away in May 2010.

[2] The first respondent is the Health Professions Council of South Africa ('the HPCSA'), being the Council established by s 2 of the Health Professions Act 56 of 1974 ('the HP Act'). The second respondent is the Professional Board for Optometry and Dispensing Opticians ('the PBO'), being a professional board established in terms of s 15 of the HP Act.[1]

[3] During June 2012 Buchanan lodged a complaint with the Competition Commission in terms of s 49B(2)(b) of the Competition Act 88 of 1998 ('the Competition Act'). During October 2012 the Commission issued a decision of non-referral in terms of s 50(2)(b). In November 2012 Buchanan referred the complaint to the Competition Tribunal in terms of s 51(1).

[4] The essence of Buchanan's complaint is that lay ownership of optometry practices is prohibited by rule 8 of the Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act ('the Ethical Rules') and by para 2 of the HPCSA's Policy Document on Undesirable Business Practices ('the Policy Document'). The Ethical Rules were made by the HPCSA in terms of s 61A(1) of the HP Act and were promulgated in the *Government Gazette* during August 2006. They are of general application to health professions. The Policy Document was adopted by the HPCSA during October 2003. The Policy Document is of general application to health professions. Buchanan alleges that rule 8 of the Ethical Rules and para 2 of the Policy Document embody a decision by an association of firms within the

[1] The POB was established in terms of the Regulations Relating to the Constitution of a Professional Board of Optometry and Dispensing Opticians published in the *Government Gazette* on 27 February 1998.

meaning of s 4(1) of the Competition Act and that these decisions, in relation to optometry, have the effect of substantially preventing or lessening competition in the optometry market in violation of s 4(1)(a).

[5] In his referral Buchanan sought orders declaring the adoption of rule 8 and the Policy Document to constitute, in relation to the practice of optometry, a contravention of s 4(1)(a); an interdict preventing the respondents from enforcing rule 8 and the Policy Document in respect of the practice of optometry; an interdict preventing the respondents from engaging in any conduct or adopting any rule policy that restricted lay ownership of optometry practices; an order directing the respondents to amend the Policy to make provision for lay ownership of optometry practices; an order directing the HPCSA to exempt from the application of rule 8 all professionals registered as optometrists; and costs.

[6] The respondents opposed the relief sought by Buchanan. They raised several in limine points. Among these were the following: (i) that, given the manner in which the HPCSA was composed, its decisions could not be regarded as decisions made by firms competing in optometry; (ii) that the impugned restriction on lay ownership was 'implicitly required or authorized by' the provisions of the HP Act, especially section 54A of the HP Act, so that the restriction could not be challenged in terms of the Competition Act but only for inconsistency with the Constitution. The second of these preliminary points was described as going to the Tribunal's jurisdiction, and for convenience I shall refer to it as the jurisdictional point. On the merits the respondents denied that the restriction substantially lessened competition in optometry.

[7] The in limine points were not argued at the commencement of the hearing, which got underway on 27 May 2014. Instead evidence was heard over nine days during May and June 2014. As was to be expected, the evidence dealt almost exclusively with the merits. The Tribunal heard closing argument on 10 July 2014. On 18 December 2014 the Tribunal dismissed the complaint but made no order as to costs.

The Tribunal's decision

[8] The Tribunal recorded in its decision that it had understood, when the matter was set down for hearing, that by agreement the points in limine would be heard together with the merits though at the hearing there was a dispute as to whether or not this was so. As a fact, the Tribunal did not deal with the in limine points upfront.

[9] The Tribunal rejected the first of the two in limine contentions summarised above, namely the respondents' contention that the Ethical Rules and Policy Document did not reflect a decision among firms to which s 4(1) applied. In regard to the second of those in limine contentions (the jurisdictional point), the Tribunal summarised the competing submissions of the parties but said that it did not have jurisdiction to decide which argument was correct. This was on the supposed basis that the Tribunal's powers did not extend to interpreting any legislation apart from the Competition Act. Buchanan's recourse in relation to this particular point was, in the Tribunal's view, to approach the High Court. The Tribunal proceeded to consider the merits of the matter on the basis that they would give Buchanan 'the benefit of the doubt' and 'in the interests of justice'. On the merits the Tribunal found that Buchanan had failed to establish a substantial lessening of competition in the optometry market.

[10] Buchanan appeals against the dismissal of his complaint. The respondents cross-appeal against the Tribunal's decision not to award them their costs. The respondents support the dismissal inter alia on the basis of the in limine points which the Tribunal either rejected or declined to decide. Buchanan was represented in the appeal by Ms Norton leading Mr Reid (the heads having been drawn by Buchanan's attorney) while the respondents were represented by Mr Maenetje SC leading Mr Navsa.

The appeal: the jurisdictional point

[11] In the view we take of the matter it is necessary only to consider the jurisdictional point. The essence of the respondents' contention is that the prohibition against lay ownership of optometry practices is to be found in the HP Act

and not in the Ethical Rules or Policy Document, the latter instruments merely being of an explanatory nature. We agree.

[12] There is no dispute about the core activities of the practice of optometry and optical dispensing, namely the testing of eyesight and the prescribing and supply of spectacles and contact lenses to patients. (For convenience I shall refer simply to optometry since for present purposes there is no relevant distinction between the two fields of practice.)[2] It is the practice of optometry in this core sense that Buchanan believes should be open to lay ownership, even though the relevant services would still have to be rendered by employed professionals who are duly registered in terms of the HP Act.

[13] Rule 8 of the Ethical Rules, which as I have said applies to all health professions including optometry, reads as follows (the Act referred to therein being the HP Act):

'(1) A practitioner may practise in partnership or association with or employ only a practitioner who is registered under the Act and who is not prohibited under any of the annexures to these Rules or any ethical rulings from entering into such partnership or association or being so employed: Provided that, in the case of employment, the practitioner so employed either provides a supportive healthcare service to complete or supplement the employing practitioner's health care or treatment intervention or is in the same professional category as the employing practitioner.

(2) A practitioner shall practise in or as a juristic person who is exempt from registration in terms of section 54A of the Act only if such juristic person complies with the conditions of such exemption.

(3) A practitioner shall practise in a partnership, association or as a juristic person only within the scope of the profession in respect of which he or she is registered under the Act.

[2] A registered optometrist may test eyes and prescribe and supply spectacles and contact lenses to correct errors of refraction. A dispensing optician may supply spectacles and spectacle lenses on the prescription of a registered medical practitioner or registered optometrist (see Annexure 8 to the Ethical Rules in volume pp 2430-2432 of the appeal record). See also *South African Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited* 1985 (3) SA 100 (O) at 102E-I and *Noll & Others v Alberton Frames Pty Ltd & Others* 1989 (1) SA 730 (T) at 731H-732H for a summary of the regulatory distinction between the two professions.

(4) A practitioner shall not practise in any other form of practice which has inherent requirements or conditions that violate or potentially may violate one or more of these Rules or an annexure to these Rules.'

[14] The Policy Document states that it 'forms part of the many policy directives on ethical conduct and professional practice' and is thus 'an integral part of the regulations specifying acts/omissions in respect of which disciplinary measures may be instituted against' health care practitioners registered under the HP Act. Para 2 reads thus:

'2.1 Acceptable Business Models

- Solo Practice
- Partnerships
- Associations
- Incorporated Practices
- Any of the above who outsourced their administration or established a close corporation to manage the administration provided that the practitioner does not permit or allow the Administrators to operate in violation of the established ethical rules of Council.

NB: Any other business model/formation or structure outside of these models is therefore unacceptable and would lead to prosecution by the HPCSA.

2.2 Undesirable Business Models

A distinction needs to be made between corporate ownership and corporate involvement. While corporate ownership refers to transfer or acquiring of an actual interest in a professional practice business, corporate involvement would refer to instances where a corporate entity through some equity exchange provides capital or infrastructure to the professional practice business in return for material benefit, sharing profits and/or control over the manner in which the business is run.'

[15] Para 2 proceeds to elaborate on the concepts of 'corporate ownership' and 'corporate involvement'. It is stated inter alia that 'direct or indirect corporate ownership of a professional practice by a person other than a registered practitioner under the HPCSA is not permissible'. 'Corporate ownership' is said to mean

> ‘allowing a person (whether a natural person or a juristic person) who does not otherwise qualify as a partner or shareholder of a professional practice in terms of the Act or the Ethical Rules, to directly or indirectly, in any manner whatsoever, share in the profits or income of such a professional practice and which, without limiting the generality of the aforegoing, may take the form of –…’.

Certain examples are then listed. ‘Corporate involvement’ is said to mean

> ‘allowing corporate entities or other persons to provide services (whether of a financial, investment, administration, rental or similar nature) to a professional practice in terms of an agreement (other than a simulated agreement) negotiated on an arms-length basis and in terms of which an objectively determined market related and fair remuneration or fee is payable by the professional practice to the entity or such other person for the services rendered’.

[16] I turn now to a consideration of the provisions of the HP Act. An analysis of these provisions will show that rule 8 of the Ethical Rules and para 2 of the Policy Document are simply an endeavour by the HPCSA to explain what the HP Act does and does not allow and to brand conduct in violation of the HP Act as unethical conduct.

[17] Section 1 defines ‘health profession’ as meaning any profession for which a professional board has been established in terms of s 15 and includes any category or group of persons provided for by such board. The POB is such a board, and optometry is thus a ‘health profession’ for purposes of the HP Act.

[18] Section 16 prohibits the providing of training which has at its object to qualify any person for the practice of a health profession unless such training has been approved by the relevant professional board. In terms of s 24 the Minister may, on the recommendation of the HPCSA, prescribe the qualifications obtained by virtue of examinations conducted by an accredited university or other educational institution or examining authority in the Republic which, when held singly or conjointly with any other qualification, shall entitle the holder to registration in a registration category in terms of the Act. The performance of one year’s remunerated community service is in terms of s 24 a pre-requisite for registration.

[19] Section 17(1) reads as follows:

'(1) No person shall be entitled to practise within the Republic –

(a) any health profession registrable in terms of this Act; or

(b) except in so far as it is authorized by legislation regulating health care providers and sections 33, 34 and 39 of this Act, any health profession the practice of which mainly consists of –

(i) the physical or mental examination of persons;

(ii) the diagnosis, treatment or prevention of physical or mental defect, illnesses or deficiencies in humankind;

(iii) the giving of advice in regard to such defects, illnesses or deficiencies; or

(iv) the prescribing or providing of medicine in connection with such defects, illnesses or deficiencies,

unless he or she is registered in terms of this Act.'

[20] Section 17(2) states that any person desiring to be registered in terms of the HP Act

'shall apply to the registrar and shall submit the qualification which, in his or her submission, may entitle him or her to registration, together with such proof of identity and good character and of the authenticity and validity of the qualifications submitted as may be required by the professional board concerned'.

[21] It is self-evident that only a natural person is capable of obtaining the requisite qualifications pursuant to examination and of so applying for registration.

[22] Section 17(5) states that any person who is not registered in terms of the HP Act and who practises a health profession in contravention of s 17 or who pretends to hold such registration is guilty of an offence.

[23] Section 33(1) provides as follows:

'The Minister may, on the recommendation of council and the relevant professional board, by regulation define the scope of any health profession registrable in terms of this Act by specifying the acts which shall for the purposes of the application of this Act be deemed to be acts pertaining to that profession…'.

[24] The Minister has, in terms of the above provision, defined the acts deemed to be acts pertaining to the profession of optometry and optical dispensing respectively.[3] For present purposes it is enough to note that these acts include the core activities which, in Buchanan's view, should be open to lay ownership.

[25] Section 34(1) reads thus:

'(1) Subject to the provisions of sections 33(2)(c) and 39, no person shall practise within the Republic any health profession the scope of which has been defined by the Minister in Terms of Section 33(1), unless he or she Is registered in terms of this Act in respect of such profession.'

In terms of s 34(2), a contravention of the above prohibition is a criminal offence.

[26] Section 39(1) provides as follows:

'(1) No person shall perform any act deemed to be an act pertaining to any health profession as may be prescribed under this Act unless he or she –

(a) is registered in terms of this Act in respect of such profession;

(b) (i) is registered in terms of this Act in respect of any other profession referred to in section 33 to which such act is also deemed to pertain; or

(ii) practises a health profession in respect of which the registrar in terms of this Act keeps a register and such act is deemed to be an act which also pertains to such profession; or

(c) and (d) [deleted]

(e) is registered or enrolled as a nurse under the Nursing Act, 1978 (Act 50 of 1978), and such act is an act which also pertains to the profession of a nurse.'

Contravention of this prohibition is in terms of s 39(2) a criminal offence.

[3] See footnote 2 above.

[27] On conviction of any of the offences mentioned above, the convicted person is liable to a fine or to imprisonment for a period not exceeding 12 months or to both a fine and such imprisonment.

[28] In terms of s 59(1) no remuneration is recoverable 'in respect of any act specially pertaining to the profession of a registered person' when performed by 'a person who is not registered under this Act to perform such act'.

[29] It is clear from the above provisions that, if the HP Act said nothing more on the subject, there could be no corporate ownership of optometry practices (regardless of whether the corporation were owned by registered optometrists or by lay persons) and that no lay person could own, wholly or in part, any business which conducted an optometry practice. This would flow from the fact that only natural persons can obtain the requisite qualifications and be registered and that unregistered persons are forbidden from practising optometry or from performing any act deemed to be an act pertaining to optometry or from recovering any remuneration in respect of acts pertaining to the profession of optometry. If an optometry practice were, for example, to be owned by a company, the company would be rendering the service to its patients and would be the person expecting to recover from them the contractual remuneration for services rendered. This would be so even though the testing of the patients' eyes and the prescribing of the spectacles and contact lenses would be done by professional optometrists in the company's employ. In the absence of other relevant provisions in the HP Act, a corporate practice of this kind would be unlawful.

[30] It is at this point that one encounters s 54A, on which emphasis was placed in the respondents' answering affidavit and in the Tribunal's discussion of the point now under consideration. The first two subsections of s 54A read thus:

'(1) The Minister may in consultation with the council by notice in the *Gazette* exempt any juristic person or class of juristic persons specified in the notice, either generally or subject to such conditions as may be specified in the notice, from the operation of any of the provisions of this Act, so as to enable such juristic person to practise a profession, likewise specified, in respect of which registration in terms of this Act is a prerequisite for practising.

(2) Any reference in this Act or any other law to a person registered in terms of this Act to practise a profession referred to in subsection (1) or to a partner of or a partnership in relation to such registered person, shall be deemed to include a reference to a juristic person referred to in subsection (1) or to a member of such a juristic person, as the case may be, unless the context otherwise indicated.'

[31] It will be apparent that s 54A is not the source of the prohibitions on corporate ownership and of lay ownership of optometry practices. These prohibition flow from the other provisions of the HP Act which I have identified. Section 54A is a provision which empowers the Minister to relax (by way of exemption) the restrictions of the Act in relation to the conduct of professions by corporations. There is no provision under which the Minister can exempt any other person from the provisions of the Act. In particular, the Minister has no power to permit lay individuals to conduct an optometry practice through employed professionals or to conduct an optometry practice in partnership through employed professionals.

[32] Acting in terms of s 54A, the Minister on 15 April 1994 promulgated in the *Government Gazette* an exemption in respect of private companies, subject to compliance with the conditions set out in the schedule to the exemption notice. The schedule reads thus:

'1. The company's memorandum or articles of association shall provide that all present and past directors shall be liable jointly and severally, together with the company, for the debts and liabilities of the company contracted during their period of office.

2. Only natural persons who are registered in terms of the Medical, Dental and Supplementary Health Service Professions Act, 1974, (Act No. 56 of 1974), and practise the profession of medical practitioner, dentist or psychologist or a supplementary health service profession contemplated in section 32 of the Act (hereinafter termed a practitioner in each case) or a company all the directors and shareholders of which are practitioners (hereinafter termed a corporate member) shall be shareholders of the company and have an interest in its shares: Provided that a corporate member shall not have an interest in or control, own or acquire more than 24 per cent of the issued share capital of the company.

3. Only a person who is a practitioner shall be a director of the company.

4. If a shareholder of the company or a person with an interest in the shares of the company dies or ceases to conform to any requirement of item 2, his estate or the person concerned, as the case may be, shall for a period of six months from the date on which he dies or

ceases so to conform continue to hold the shares or interest concerned or for such longer period as the South African Medical and Dental Council (hereinafter termed the Council) may approve.

5. Any share contemplated in item 4 shall not entail any voting rights and a shareholder mentioned there shall not act as the director of the company or receive, directly or indirectly, any director's fees or remuneration or share in the income of or profit earned by the company.

6. Only an authorised agent who is a shareholder of the company may speak or vote on behalf of a shareholder at a meeting of the company.

7. Each shareholder may practise personally only the profession in respect of which he is registered in terms of the Act.

8. Each shareholder shall remain subject personally to the provisions of the Act and the disciplinary authority of the Council.

9. No person, whether a natural person or a juristic person, may directly or indirectly in any manner whatsoever share in the profits or income of the company or have an interest therein unless he is a shareholder of the company.

10. If the company at any time neglects or omits to comply with any of the conditions of this Schedule, such neglect or omission shall constitute conduct on the part of the directors or shareholders in respect of which the Council may take disciplinary steps.'

[33] A company complying with the above conditions may lawfully conduct an optometry practice and recover contractual remuneration from its patients. As is clear from the above conditions, there is no exemption in respect of a company which has any lay person as a shareholder or director.

[34] The current legal position, therefore, is that the HP Act prohibits any lay ownership, whether in part or in whole, of any optometry practice, whether conducted through a corporation or otherwise. Buchanan cannot get what he wants through the Competition Act, because the restrictions of which he complains are contained in a statute. A statutory prohibition, whatever its effect on competition, is not an agreement between or a decision of firms. It is a decision of the lawmaker, here Parliament. If Buchanan has a remedy, it would have to be by way of a constitutional challenge to the relevant provisions of the HP Act or by way of a review of the Minister's failure to promulgate a wider exemption in respect of corporate practices. In either case, the relevant challenge would have to be

instituted in the High Court. (Needless to say, we express no opinion on whether any such challenge would have merit.)

[35] Once the provisions of the HP Act and the limited scope of the exemption are appreciated, rule 8 of the Ethical Rules and para 2 of the Policy Document are revealed as no more than an attempt by the HPCSA to explain the legislative restrictions in regard to lay and corporate involvement in professional health practices. It is unnecessary to decide whether the Ethical Rules and Policy Document do so accurately, because one will not find in those instruments any relevant restriction (ie a restriction of which Buchanan complains) which is not sourced in the HP Act.

[36] It follows that Buchanan's complaint was correctly dismissed. We express no opinion on the other questions debated before the Tribunal.

[37] The Tribunal erred in finding that it did not have jurisdiction to determine whether the restrictions of which Buchanan complained were imposed by the Ethical Rules and Policy Document or by the HP Act. In order to embark upon an investigation of the merits of the s 4(1)(a) complaint, the Tribunal had to ascertain whether the restrictions which were said substantially to prevent or lessen competition were to be found in an agreement or concerted practice or decision within the meaning of s 4(1). The parties appear to have been in agreement that this threshold requirement would not be met if the restrictions were contained in the HP Act rather than in the Ethical Rules and Policy Document. The Tribunal thus had to decide which of the competing contentions was correct.

[38] The Tribunal's misapprehension of its jurisdiction is illustrated by the futility of its investigation into the merits of the complaint. If the relevant restrictions were statutory, a finding in favour of Buchanan on the merits would not have entitled the Tribunal to grant any relief, because all the relief he sought presupposed that the restrictions were to be found in the Ethical Rules and the Policy Document rather than in the HP Act.

[39] This was clearly a case in which the preliminary issue analysed above should have been decided before the leading of evidence. Because this course was not followed, nine days were unnecessarily taken up with oral evidence spanning 1373 transcribed pages.

The cross-appeal: costs

[40] In terms of s 57(2)(a) of the Competition Act, the Tribunal had a discretion to award costs against Buchanan. The Tribunal stated that in the ordinary course costs would follow the result. That this is the general rule was recognised by this court in *Novartis SA Pty Ltd v New-United Pharmaceutical Distributors (Pty) Ltd (1)* [2001-2002] CPLR 74 (CAC), though the general rule is subject to the overriding principle that costs are in the discretion of the Tribunal, provided that the discretion is exercised judicially after a consideration of all relevant facts.

[41] The Tribunal decided not to make a costs order against Buchanan. It gave two reasons for so deciding: (i) There was a procedural dispute as to whether the parties had agreed to hear the in limine point and the merits together. Buchanan was not at fault in that regard. (ii) Although Buchanan had failed to show a substantial prevention or lessening of competition, his complaints were 'neither trivial nor inconsequential'.

[42] We have concluded that the Tribunal erred in failing to decide the in limine point and in embarking on a consideration of the merits. We are thus at large to reconsider the question of costs.

[43] Counsel informed us that at a pre-hearing conference held in terms of rule 21 of the Tribunal's rules the respondents' counsel submitted to the presiding member that the jurisdictional point should be decided first, a proposal not resisted by Buchanan. Despite this, the presiding member ruled that all issue should be tried together. It was no doubt for this reason that two weeks were reserved for the trial.

[44] I have indicated that the answering affidavit did not articulate the jurisdictional issue as clearly as might have been desired. No reference was made to any

provisions of the HP Act other than s 54A. The limited terms of the exemption promulgated in terms of s 54A were not mentioned. Mr Maenetje said that he did not recall having elaborated upon the issue at the pre-hearing conference, save for identifying it as a potentially decisive point. However, during his opening address (which, because of an interposed witness, took place on the second day) he summarised the point in clear terms, emphasising the prohibition in s 17(1) and placing s 54A in its statutory context.[4] He submitted that what Buchanan was effectively asking the Tribunal to do was to amend legislative prohibitions, something the Tribunal did not have jurisdiction to do.

[45] I think the respondents should, at the commencement of the trial, have invited the Tribunal to revisit the presiding member's earlier ruling that all issues be tried together. In any event, upon hearing Mr Maenetje's summary of the jurisdictional issue, the Tribunal should itself have revisited the ruling. It was obvious that the jurisdictional point had prima facie merit and would, if decided in the respondents' favour, render all the proposed evidence irrelevant. The Tribunal should have insisted that the point be argued first. (In saying this, I do not want to be understood as conveying that the Tribunal must in all instances decide preliminary issues first. The Tribunal is entitled to guard against the abuse of preliminary points to delay proceedings. Much will depend on the prima facie merit of the preliminary issue, whether it can be decided without evidence, and the likely duration and cost of the trial if a decision on the preliminary issue were deferred.)

[46] Not only did the Tribunal not follow this course; it erroneously concluded, at the end of the whole case, that it had no jurisdiction to interpret the HP Act. I think we must assume that, even if the jurisdictional issue had been argued in limine, the Tribunal would have reached the same erroneous conclusion on its jurisdiction. But if the point had been argued as a preliminary issue, it is possible that the Tribunal would have realised its force and declined to hear evidence on the merits until the jurisdictional issue was decided by (as the Tribunal conceived it) the appropriate forum. In other words, the Tribunal might then have declined to 'give the benefit of the doubt' to Buchanan and hear him on the merits.

[4] Volume 1 pp 154-156 and pp 167-174.

[47] Buchanan can be criticised for not having joined with the respondents in strongly urging the Tribunal to decide the preliminary issue. There is some indication in the cross-examination that he was aware of the true force of the statutory prohibitions. The limited scope of the exemption promulgated under s 54A was explained to him.[5] He did not abandon his case.

[48] Nevertheless, it seems to me that the unnecessary leading of evidence on the merits is primarily attributable to the course adopted by the Tribunal. It would be unfair in the circumstances to saddle Buchanan with the costs of a futile nine-day trial. I see no reason, however, why he should not have to pay the costs that would have been incurred had the jurisdictional issue been determined as a preliminary issue. This is analogous to the situation where, at the end of a trial, the court finds in favour of the defendant on a point which could have been taken on exception. In such a situation the court may properly limit the defendant to costs as on exception. If the preliminary issue here had been determined as a threshold question, it would not have been necessary for witness statements and expert reports to be filed. A one-day hearing would have sufficed. The employment by the respondents of two counsel in the Tribunal was a prudent precaution.

<u>Conclusion</u>

[49] It follows that the appeal fails and the cross-appeal succeeds. The respondents having been substantially successful, Buchanan must bear their costs in this court.

[50] The following order is made:

(a) The appeal is dismissed.

(b) The cross-appeal succeeds to the following extent: The order in para [138] of the Tribunal’s decision is set aside and replaced with an order in the following terms:

‘[138] The applicant is ordered to pay the respondents’ costs, including those attendant on the employment of two counsel, save the parties shall bear their own costs in relation to

[5] Volume 3 pp 454-462.

(i) the preparation of witness statements and expert reports; (ii) the days of the hearing beyond the first day thereof.'

(c) The appellant is directed to pay the respondents' costs of the appeal, including those attendant on the employment of two counsel.

APPEARANCES

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