IN THE COMPETITION APPEAL COURT

CAC Case No: 91/CAC/Feb10
CT Case Nos: 15/CR/Feb07
50/CR/May08

In the matter between:

THE COMPETITION COMMISSION **A**ppellant

and

PIONEER FOODS (PTY) LTD Respondent

JUDG M E N T

Delivered on 15th October 2010

WALLIS AJA (DAVIS JP AND PATEL JA concurring)

[1] The appeal in this case was set down in June 2010 to be heard on 21 September 2010. On 13 September 2010 the Registrar received a letter from the attorneys representing the Commission in the following terms:

'2 The Competition Commission and Pioneer Foods ("the parties") are in settlement discussions. As a result they have agreed to postpone the hearing of the appeal *sine die* pending the finalisation, signing and filing of the settlement agreement before the Tribunal.

3 Please let us know whether it will be necessary for counsel to appear on 21 September to postpone the matter.'

The contents of the letter gave rise to concern on the part of the member of the Court as to the scope of any possible 'settlement' between the

Commission and Pioneer and the proper approach to be taken by this Court to requests of this nature. In those circumstances we decided that the question of settlement and possible postponement of the appeal, as well as any matters arising from a settlement, should be addressed in open court consistently with the constitutional requirement that court proceedings take place in a public hearing. In the result both parties were represented before us by senior and junior counsel and after the hearing they furnished us with supplementary written submissions.

[2] We were informed by counsel that Pioneer has agreed to accept the determination by the Tribunal and the Commission has in turn agreed to withdraw its appeal against the quantum of the administrative penalty imposed by the Tribunal. In those circumstances the parties no longer sought a postponement of the proceedings but leave to withdraw the appeal and cross-appeal respectively. On enquiry we were given the assurance that this arrangement has been arrived at strictly and solely on the basis that the Tribunal's determination will remain intact in its entirety and be complied with by Pioneer. We were also given the assurance that there is no additional or alternative *quid pro quo* that has been offered or given by either party in return for the conclusion of this arrangement. In other words no other consideration has passed between the parties in order to induce them to conclude the arrangement.[1] It is on that basis alone that we were asked to give the parties leave to withdraw the appeal and cross-appeal and we did so. These are our reasons for granting that leave.

[3] Rule 19(4) contemplates that a prospective appellant may withdraw an appeal prior to the delivery of the appeal record and will be deemed to

1 The Commission's supplementary submissions gave further detail of the settlement that confirmed what we had been told in the course of the hearing.

have withdrawn the appeal if it fails to deliver the appeal record timeously. Where there is such a withdrawal or deemed withdrawal and the respondent has noted a cross-appeal the respondent is faced with an election under rule 19(4) either to deliver notice of its intention to pursue its cross-appeal, in which event it becomes to all intents and purposes the appellant and assumes responsibility for the delivery of the record, or to abandon its cross-appeal.

[4] Apart from these provisions the rules do not contemplate the postponement or withdrawal of an appeal. Once the record has been delivered the registrar, in consultation with the Judge President[2] makes arrangements for a date for the hearing of the appeal and gives a notice of set down.[3] At that stage the Court is seized of the appeal. In our view once that occurs the appeal must proceed on the date allocated and can only be postponed or withdrawn with the leave of the court. There are a number of reasons why this should be the case, some practical and some concerning the nature of these proceedings.

[5] In the first instance at the level of procedure, once an appeal is before the Court and a date for hearing has been allocated, the records are distributed to the judges who start preparing the appeal. As they are drawn from several different divisions of the High Court and are not removed from their normal duties whilst engaged in preparation this is work that needs to be undertaken in the course of other judicial work. If the parties are free to postpone cases at will, even very shortly prior to the hearing, that work will be wasted.[4] If it then becomes necessary for the

2 The Judge President assigns the case to a court in terms of s 38(2) of the Competition Act 89 of 1998 ('the Act').
3 Rule 22.
4 This has occurred previously in the experience of the court in a case of an appeal by SAA against a determination by the Tribunal.

court to reassemble on some other occasion to deal with the case the preparation will have to be undertaken all over again. That is wasteful of scarce judicial time and resources. Here the reason advanced for the postponement was an attempt to settle the case but if parties are permitted *mero motu* to agree to postponements there would be nothing to prevent them from doing so for other reasons, such as the non-availability of a favoured legal representative. Those practical reasons dictate in both the Constitutional Court and the Supreme Court of Appeal that postponements are not to be had for the asking and that postponements cannot be secured merely by agreement between the parties.[5] It is appropriate for us to lay down the same rule and the same approach in relation to appeals before this Court.

[6] In regard to the withdrawal of appeals other considerations may come into play. These flow from the special nature of the jurisdiction exercised by the Tribunal. It is not like a court adjudicating civil disputes. Whilst those may raise matters of great public importance they are first and foremost disputes between the parties themselves. Generally speaking therefore if the parties no longer wish to pursue the litigation they are free to withdraw from the fray. In addition any private arrangements they may make in regard to the terms of withdrawal are for them to determine.

[7] The letter sent to the registrar of this Court on 13 September appeared to proceed on the footing that a similar approach can be adopted to an appeal to this Court from a determination by the Tribunal. It was that approach that prompted disquiet among the members of the Court and in case it reflects a view held by practitioners in the field of competition law

5 *National Police Service Union and others v Minister of Safety and Security and others* 2000 (4) SA 1110 (CC) at 1112C-f and *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) para [28].

it is as well to dispel it.

[8] The Competition Tribunal is a tribunal of record established for the purpose *inter alia* of adjudicating upon conduct that is said to constitute a contravention of the provisions of Chapter 2 of the Act and, if such conduct is found to have occurred, to impose any remedy provided by the Act.[6] It deals with matters that are placed before it by way of a complaint and its jurisdiction is acquired from and determined by such complaint. The conduct that can form the subject of a complaint is conduct that the Act prohibits, sometimes absolutely, as in the case of contraventions of s 4(1)(b), 8(a) to (c) and 9 of the Act, and sometimes subject to an efficiency defence, as with contraventions of s 4(1)(a), 5 and 8(d) of the Act. The Tribunal has the power to impose administrative penalties that can be substantial as illustrated by the present case where the total penalty amounted to R 195 718 614. The Supreme Court of Appeal has recently said in passing that administrative penalties imposed by the Tribunal bear a close resemblance to criminal penalties.[7] This should not be taken as detracting from the decision by this Court[8] that proceedings before the Tribunal are not criminal proceedings for the purposes of the Constitution, but is merely a reflection of the fact that in their amount, their intended deterrent purpose and undoubted punitive effect and the fact that they are paid into the Consolidated Revenue Fund they bear a resemblance to fines, as reflected in the language of s 59(4).

[9] There is provision in the Act[9] for a party accused by the Competition Commission of having engaged in prohibited conduct to reach an

6 S 27(1)(a) of the Act.
7 *Woodlands Dairy and another v The Competition Commission* [2010] ZASCA 104, para [10].
8 In *Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v The Competition Commission* [2005] 1 CPLR 50 (CAC).
9 S 49D.

agreement with the Commission and for a consent order to be sought without the need for an adjudication by the Tribunal on the merits of any complaint, beyond the Tribunal determining whether to make the proposed order, indicate whether it requires changes to the order or refusing to make the order.[10] That occurs during or after completion of the investigation of a complaint. It is unnecessary for present purposes for us to consider whether such an order may be sought during the course of a hearing before the Tribunal on an allegation that prohibited conduct has been committed or whether it can only be sought prior to the referral of a complaint. What is clear however is that such an order cannot be sought or granted after the Tribunal has adjudicated on a complaint referred to it and made an order. Once that has occurred the Tribunal has discharged its statutory function and its jurisdiction in regard to the complaint is exhausted. In technical legal parlance it is *functus officio.* The situation is no different from that which arises once a court has rendered its judgment. That is reinforced by the fact that any decision, judgment or order of the tribunal is enforceable as if it were an order of the High Court.[11]

[10] It follows that it is not open to the Commission and a party against which the Tribunal has made a determination that they have contravened provisions in Chapter 2 of the Act to enter into an agreement subsequent to the determination altering its content or effect and then place it before the Tribunal to obtain its *imprimatur*, which appeared to be the intention as conveyed in the letter if 13 September. In the absence of any statutory provision authorising such a proceeding it is impermissible as it amounts to a request that the Tribunal alter its earlier decision, something that it

10 S 49D(2).
11 S 64(1).

has only limited power to do.[12] Under the structures established by the Act it is only this Court that has the power to alter a determination by the Tribunal and then only in the exercise of its powers in terms of s 37(2) of the Act after due consideration of an appeal against that determination.

[11] In civil proceedings before the High Court none of this would matter because it would generally speaking be open to the parties to compromise their dispute on such terms as they saw fit. However it does not seem to us that it is correct to treat proceedings arising from a complaint being referred to the Tribunal by the Commission as standing on the same footing as a conventional civil suit. First the proceedings are directed at adjudicating on conduct that is prohibited by the Act, in other words, on conduct that the legislature has seen fit to outlaw in the public interest. Second the Commission is representing the public interest and acts as 'claimant cum prosecutor'.[13] The public interest is that interest that all South Africans have in open and unfettered competition in our economy. The Commission is assigned to this task because of the difficulties facing ordinary citizens in pursuing anti-competitive conduct through normal court channels. Third the determination by the Tribunal results, at least when an administrative penalty is imposed, in an order that resembles a fine imposed in criminal proceedings. As we have previously observed the proceedings before the Tribunal are a hybrid between criminal and civil proceedings[14] or to use the felicitous description of Lord Bingham of Cornhill they are 'adjudicative procedures of a hybrid kind, not criminal but not civil in the ordinary sense either: proceedings in which one or more parties may suffer serious consequences if an adverse decision is made".[15] Overall, on the issue of the ability to alter by agreement the

12 S 66(1).
13 *Woodlands Dairy and another v The Competition Commission* [2010] ZASCA 104, para [8].
14 *Sappi Fine Paper v The Competition Commission* [2003] 2 CPLR272 (CAC), para [47]
15 Tom Bingham *The Rule of Law* 90.

determination by the Tribunal of an administrative penalty, the closer analogy is with criminal proceedings rather than civil proceedings and it is clear that the outcome of a criminal trial cannot be overcome or avoided by subsequent private agreement. In our view it is not open to the Commission and a party on which the Tribunal has imposed an administrative penalty to abandon, compromise or alter the Tribunal's determination or the penalty that it has imposed and in the Commission's supplementary submissions this was accepted.

[12] As it was unclear from the letter of 13 September that the Commission and Pioneer Foods appreciated that the scope for them to negotiate a settlement of this dispute was narrow we required them to appear before us to deal with the basis of the withdrawal of the appeal and cross-appeal. We were then given the assurances that are described in paragraph [2] of these reasons. In the light of those assurances we gave leave for the appeal and cross-appeal to be withdrawn. As cases such as this may arise again in the future we take this opportunity to give guidance to the Commission and the legal profession who act in the area of competition law in regard to the proper approach where it is proposed to withdraw an appeal that has been set down for hearing. In such cases the registrar should be informed that the appellant (and where applicable the cross-appellant) wish to withdraw the appeal (and where applicable the cross-appeal). If the withdrawal involves any arrangement between the parties going beyond the fact of withdrawal the details of such arrangement need to be furnished to the registrar in order for the Court to be satisfied that the basis upon which the appeal is to be withdrawn is one that is permissible in terms of the Act and in particular that it does not involve any impermissible departure from the terms of the Tribunal's determination and order. It is unnecessary in the present case to consider

in what circumstances this Court would refuse leave to withdraw an appeal.

[13] Leave was given to the Commission to withdraw its appeal and to Pioneer Foods to withdraw its cross-appeal. In view of that it would not be appropriate for us to express any views on the issues raised by the appeal and we refrain from doing so.

APPEARANCES:

APPELLANT: D N UNTERHALTER SC (with him K H SHOZI)

RESPONDENT S BURGER SC (with him E FAGAN SC and K PILLAY)