IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC CASE NO: 77/CAC/Jul08

CT CASE NO: 31/CR/MAY05

In the matter between:

OMNIA FERTILIZER LTD	**APPELLANT**
and	
THE COMPETITION COMMISSION	**RESPONDENT**

***In Re*:**

CASE NO: 31/CR/MAY05 and CASE NO: 45/CR/MAY06

THE COMPETITION COMMISSION OF SOUTH AFRICA	**APPLICANT**
And	
SASOL CHEMICAL INDUSTRIES (PTY) LTD	**FIRST RESPONDENT**
YARA (SOUTH AFRICA) (PTY) LTD	**SECOND RESPONDENT**
OMNIA FERTILIZER LTD	**THIRD RESPONDENT**
AFRICAN EXPLOSIVES AND CHEMICAL INDUSTRIES LTD	**FOURTH RESPONDENT**
NUTRI-FLO CC	**FIFTH RESPONDENT**
NUTRI FERTILIZER CC	**SIXTH RESPONDENT**

Judgment DELIVERED ON: 16 October 2009

Patel J

INTRODUCTION

[1] The Competition Commission ("the Commission") applied to the Competition Tribunal ("the Tribunal") for an order consolidating two complaint referrals under one case number. The first complaint was lodged by Nutri-Flo CC and Nutri-Fertilizer CC (collectively referred to as "Nutri-Flo") on 04 May 2004. The complaint concerned allegations of contraventions of sections 4 (1) (a), 4 (1) (b), 8 (c) and 8 (d) (ii) of the Competition Act 89 of 1998 ("the Act"). The second complaint was made by Profert (Pty) Ltd ("Profert"). In terms of this complaint Profert alleged contravention s of section 4 (1) (b), alternatively s 4 (1) (a) and sections 8 and 9 of the Act. In both referrals Sasol Chemical Industries (Pty) Ltd ("Sasol") is one of the respondents' whilst Omnia Fertilizer Limited ("Omnia") is a respondent in only the first complaint.

[2] On 5 October 2007 the Commission filed an application to consolidate the Nutri-Flo and Profert complaints. Omnia opposed the consolidation application. The matter was set down for hearing on 14 February 2008 but was subsequently withdrawn by the Commission on 13 February 2008. At the hearing Omnia applied for wasted costs to be awarded against the Commission. On 07 March 2008 the Tribunal dismissed Omnia's application and the

reasons for the decision were issued on 20 June 2008.[1] This is an appeal against the Tribunal's finding that the "effect of section 57, read with the rules of the Tribunal, is to effectively bar [*the*] Tribunal from awarding costs against the Commission or any other party appearing before it except in the context of a section 51 (1) referral".

RELEVANT LEGISLATIVE PROVISIONS

[3] I set out herein below the applicable legislative provisions of the Act:

3.1 In section 1 (1) a *complainant* is defined to mean a person who has submitted a complaint in terms of section 49B (2) (b).

3.2 Section 49B – Initiating a complaint

(1) The Commissioner may initiate a complaint against an alleged prohibited practice.

(2) Any person may –

(a) submit information concerning an *alleged prohibited practice* to the Competition Commission, in any manner or form; or

(b) submit a complaint against an *alleged prohibited practice* to the Competition Commission in the *prescribed* form.

3.3 Section 51 - Referral to Competition Tribunal

[1] The decision is reported at [2008] 2 CPLR 337 (CT).

(1) If the Competition Commission issues a notice of non-referral in response to a complaint, the *complainant* may refer the complaint directly to the Competition Tribunal, subject to its rules of procedure.

3.4. Section 57 - Costs

(1) Subject to subsection (2) and the Competition Tribunal's rules of procedure, each party participating in a hearing must bear its own costs.

(2) If the Competition Tribunal-

(a) has not made a finding against a *respondent*, the Tribunal member presiding at a hearing may award costs to the *respondent*, and against a *complainant* who referred the complaint in terms of section 51 (1); or

(b) has made a finding against a *respondent*, the Tribunal member presiding at a hearing may award costs against the *respondent*, and to a *complainant* who referred the complaint in terms of section 51 (1).

DECISION OF THE COMPETITION TRIBUNAL

[4] The Tribunal's approach to the matter was dictated by two principles, firstly that the Tribunal did not enjoy inherent jurisdiction, and secondly that the Legislature sought to circumscribe the powers of the Tribunal to those set out in the Act. The Tribunal held that the effect of s 57, read with the Rules of the Tribunal, was

to bar the Tribunal from awarding costs against the Commission or any other party appearing before it except in the context of a s 51 (1) referral. And when the Tribunal exercised its discretion in that context, it had to do so in accordance with its rules.[2] In the course of his judgment, the presiding member of the Tribunal said:

> "In summary, costs can be awarded against the State in administrative, constitutional or delictual cases. In cases involving statutory bodies or public officers, courts will not easily award costs if the public officer acted, mistakenly, but in good faith. However, this rule is not to be elevated to a rigid rule where judicial discretion is fettered. Courts, however, are reluctant to award costs against a prosecutor or an entity akin to a prosecutor acting in good faith. In the case of an interlocutory application a court would be even more reluctant to award costs against an attorney-general. The award of costs is always an exercise of judicial discretion, even if it is done in terms of the provisions of a statute".[3]

The Tribunal stated that its decision should not be interpreted to mean that the Commission or any other party for that matter has carte blanche in proceedings before the Tribunal.

OMNIA'S GROUNDS OF APPEAL

[5] The grounds of Omnia's appeal are set out below:

[2] Ibid at para 39.
[3] Ibid at para 13.

5.1 that the Tribunal erred in finding that it had no jurisdiction to order an adverse costs order against the Commission;

5.2. that the Tribunal's interpretation of s 57 (1) of the Act and Rule 58 (1) of the Tribunal's rules was erred;

5.3 that there is no general principle that each party bears its own costs but rather a default position;

5.4 that the Minister, and not the Tribunal, has the power to promulgate rules for the Tribunal in the form of regulations;

5.5 that the Tribunal had erred in stating that Omnia's argument was one which undermined the separation of powers;

5.6 that the Tribunal erred by stating that regulations may not be used as an aid in interpreting the statute or in order to extend the powers granted in the statute;

5.7 that the Tribunal failed to find that it had the discretionary power to order costs against the Commission and

5.8 Omnia submitted finally that a costs order was appropriate for the following reasons:

5.8.1 that the consolidation application was brought at a late stage which was bound to cause inconvenience and prejudice;

5.8.2 the Commission had overstated the extent of the overlaps between the two complaint referrals;

5.8.3 the Commission failed to take into account the procedural consequences of a consolidation;

5.8.4 the consolidation application was withdrawn at the last hour; and

5.8.5 the Commission had acted recklessly or at least negligently in that the consolidation application was launched and later withdrawn.

It was submitted on behalf of Omnia that the Tribunal's order be set aside and replaced with an order directing the Commission to pay its costs in opposing the consolidation application.

THE ISSUES

[6] The issue is whether the Tribunal can order the Commission to pay costs in proceedings before it. Even if this question is answered in the negative, this court would have to decide whether it should, in any event, order costs against the Commission.

STRUCTURE OF THE INSTITUTIONS

[7] The Act creates a hierarchy of three specialist institutions to apply and enforce its provisions: the Competition Commission, the Competition Tribunal and the Competition Appeal Court. The Commission is an independent administrative body created and generally tasked with policing compliance with the Act. In *Sasol Chemical Industries (Pty) Ltd v The Competition Commission and others; In re The Competition Commission v Sasol Chemical Industries (Pty) Ltd and others* [2008] 2 CPLR 351 (CT) at para 33 it was held that:

> "As a creature of statute, the Tribunal does not enjoy inherent jurisdiction. Nor is it entitled to extend any of its substantive powers beyond the four corners of the statute. Where powers incidental and necessary are required for it to perform its functions, it must read such powers into its statute only by necessary implication".

The Tribunal is a specialist administrative tribunal created under the Act. As an administrative tribunal, it can exercise jurisdiction only to the extent permitted by the Act. Its operation is given further detail in the Rules for the Conduct of Proceedings in the Competition Tribunal ("the Tribunal Rules"). The Competition Appeal Court, on the other hand, derives its powers from the Act. Its status is similar to that of a High Court.

COSTS

[8] At this juncture it is important to consider the relevant provisions of the Tribunal Rules.

8.1 Rule 50 - Withdrawals and postponements

(3) Subject to section 57-

(a) a Notice of Withdrawal may include a consent to pay costs; and

(b) if no consent to pay costs is contained in a Notice of Withdrawal the other party may apply to the Tribunal by Notice of Motion in Form CT 6 for an appropriate order for costs.

8.2 Rule 58 - Costs and taxation

(1) Upon making an order under Part 4, the Tribunal may make an order for costs.

(2) Where the Tribunal has made an award of costs in terms of section 57, the following provisions apply:

(a) The fees of one representative may be allowed between party and party, unless the Tribunal authorises the fees of additional representatives.

(b) The fees of any additional representative authorised in terms of paragraph (a) must not exceed one half of those of the first representative, unless the Tribunal directs otherwise

…

(j) Any decision by a taxing master is subject to the review of the High Court on application.

[9] As a general rule, each party participating in Tribunal complaint proceedings is required to bear its own costs.[4] But the general rule is subject to two limitations, namely s 57 (2) and the Tribunal Rules. Section 57 (2) allows the Tribunal to award costs in circumstances as between a complainant and a respondent and only where the complainant and respondent are parties in terms of s 51 (1). In my view, a referral in terms of s 51 (1) does not include the Commission as a complainant.

[10] Omnia's argument on the authority of the Tribunal to make costs orders against the Commission is founded on two main propositions. First, that the Tribunal has power to order costs against the Commission and second, that the Tribunal has a discretion whether or not to invoke such power. In essence Omnia

[4] Section 57 (1).

contends that the Tribunal's power to order costs it deems appropriate is sourced in the Tribunal's rules of procedure on costs. Such rules it contends are said to trump section 57 (1) of the Act.

[11] When dealing with interpretation, the history, purpose and social and economic context of the Act should be kept in mind.[5] The Act's prime purpose is to promote an efficient economy and to provide consumers with competitive prices and product choices.

[12] A primary rule of interpretation of statutes is that the language of the legislature should be read in its ordinary sense unless, if effect is given to the ordinary grammatical meaning of the words that fall to be interpreted, it could result in some absurdity, inconsistency, hardship or anomaly which, from a consideration of the enactment as a whole, a court is satisfied the legislature could not have intended (see *University of Cape Town v Cape Bar Council and another* 1986 (4) SA 903 (A) at 913I–914J). Regard must also be had to the decision of *Dadoo Ltd and others v Krugersdorp Municipal Council* 1920 AD 530 at 543 where Innes CJ remarked as follows:

> "Speaking generally, every statute embodies some policy or is designed to carry out some object. When the language employed admits of doubt, it falls to be interpreted by the Court according to recognized rules of construction, paying regard, in

[5] Reyburn, *Competition Law of South Africa*, page 4-12.

the first place, to the ordinary meaning of the words used, but departing from such meaning under certain circumstances, if satisfied that such departure would give effect to the policy and object contemplated. I do not pause to discuss the question of the extent to which a departure from the ordinary meaning of the language is justified, because the construction of the statutory clauses before us is not in controversy. They are plain and unambiguous. But there must, of course, be a limit to such departure. A Judge has authority to interpret, but not to legislate, and he cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not reasonably capable, in order to give effect to what he may think to be the policy or object of the particular measure."

[13] The phrase '*subject to*' has no *a priori* meaning (see *Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd* 1996 (1) SA 1182 (A) at 1187J - 1188A). While the phrase is often used in statutory contexts to establish what is dominant and what is subservient, its meaning in a statutory context is not confined thereto and it frequently means no more than that a qualification or limitation is introduced so that it can be read as meaning 'except as curtailed by' (see *Premier, Eastern Cape, and Another v Sekeleni* 2003 (4) SA 369 (SCA) at para 14). And Megarry J stated in *C & J Clark Ltd v Inland Revenue Commissioners* [1973] 2 All ER 513 at 520:

> "In my judgment, the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections.

> When there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail."

One is mindful of the fact that both the Tribunal Rules and the Act employ the phrase '*subject to*'. An example is that both s 57 and Tribunal Rule 50 (3) use this phrase. This could only mean that the Tribunal Rules and the Act work hand in hand.

[14] The question must be asked: what is the significance of the Tribunal Rules in relation to the Act? It is important to consider the judgment of Jali JA in *Anglo South Africa Capital (Pty) Ltd and others v Industrial Development Corporation of South Africa and another* [2003] 1 CPLR 10 (CAC), where he said at 17:

> "In any event regulations or (rules in this case) which have not been drafted by the legislature cannot be treated together with the Act as a single piece of legislation, nor can these regulations be employed as an aid to the interpretation of the Act…Thus, rule 46 cannot be used to interpret provisions of the Act and in particular, section 53(1) and to restrict the express provision of section 53(1) (c)."

[15] On a literal interpretation of the Tribunal Rules, it appears that Rule 58 (2) (a) – (j) merely sets the procedure to be followed when seeking a costs order. If the legislature had intended to include the Commission as being capable of having costs awarded against it, the Act would have so stated. The fact that it did not do so is, in my view, an indication that that is not what it had in mind. Words

cannot, by implication, be read into a statute unless the implication is necessary in the sense that, without it, effect cannot be given to the enactment as it stands (see *American Natural Soda Ash Corp and Another v Competition Commission and Others* 2005 (6) SA 158 (SCA) at para 27).

[16] In *Mainstreet 2 (Pty) Ltd t/a New United Pharmaceutical Distributors (Pty) Ltd & others v Novartis SA (Pty) Ltd & others* [2006] JOL 18314 (CT) it was held that the Tribunal's authority to order costs is not limited to the circumstances contemplated by s 57 and that the Tribunal was entitled to make a costs award in terms of Rule 50(3). At para 12 the Tribunal held as follows:

> "The reason the Act contains an express provision dealing with costs in section 57 rather than leaving such issues to the Rules is that complaint proceedings involve both a public and private method for their prosecution. A complaint referral is normally brought at the instance of the Competition Commission, but where the Commission has issued a notice of non-referral the complaint can be brought at the instance of the private party who made it, in terms of section 51(1). As the applicants point out, the procedures are analogous to criminal proceedings where no costs orders are provided for against the state in bringing a prosecution, but when an individual institutes a private prosecution a cost award is competent. For this reason the legislature sought to make it clear that costs in these proceedings were (a) discretionary, and (b) only between the private parties. The

> Commission can neither benefit from nor be burdened with costs in these proceedings".

The Tribunal went on to hold at para 16 that, even if the Commission was an initiating party and withdrew its application, it would not be liable for costs nor could it seek costs if the converse occurred. The cross-reference is to ensure that the policy of the legislature has been imported into the rule.

[17] The only other case in which the issue of costs was taken up is *Competition Commission v South African Airways (Pty) Ltd*[6] where the Tribunal indicated that it did not consider itself barred from awarding costs in matters involving the Commission. The Tribunal stated:

> "Our previous order reserved costs 'if competent'. That rider was inserted specifically in deference to the possibility that the Tribunal may not be able to award costs for or against the Commission. That matter remains to be resolved. However, while the legal questions are unanswered, from a public policy standpoint it is clear that the prevalent notion that we are barred from awarding costs in a matter involving the Commission is responsible for a perverse set of incentives – in short it enables the Commission to adopt what Mr. Bhana in this matter aptly characterized as a 'slapdash' approach to its role in litigation. On the other hand it enables defendants to oppose matters, even matters

[6] [2001] ZACT 44.

already decided in the Tribunal and the High Court, for no apparent reason other than pique and the desire to prevent opponents from having their day in court. This matter is ripe for determination and after the final resolution of the substantive issues in this matter it will be decided. Since the award of costs for or against the Commission has serious implications for it, we did not want to decide our competence to do so without giving both parties the opportunity to fully argue the matter and hence our decision to reserve".

However in *Competition Commission v South African Airways (Pty) Ltd (1)* [2004] 1 CPLR 230 (CT) in footnote 4 the Tribunal stated that:

> "Note that in an earlier decision in this matter we left open for later argument the question of whether in complaint referrals initiated by the Commission we can give costs for or against the Commission. **Our reservation of costs should not be construed as presupposing that we can**". (My emphasis)

Therefore the Tribunal chose not to deal with the issue of costs.

[18] Much mention was made in the papers that one should look at the function of public bodies. The position was aptly set out by the Tribunal in this case where the presiding member of the Tribunal said:

> "In relation to public officers and quasi-judicial bodies or regulators the general rule is that a court will make no order as to costs if that entity was unsuccessful in its opposition but acted bona fide. In *Fleming v Fleming* 1989 (2) SA 253 (A) the Appellate Division confirmed the rule established in *Coetzeestroom* 1902 TS 216 and held that the costs should not be awarded against a public officer who carried out his official duties mistakenly, but in good faith. In *Attorney-General, Eastern Cape v Blom* 1988 (4) SA 645 (A) the court expressed the view, in obiter, that this rule should not be elevated to a rigid rule which would fetter judicial discretion. Nevertheless, courts are reluctant to award costs against prosecutors or entities which are akin to a prosecutor. In *Nortje v Attorney General, Cape and Another* 1995 (2) SA 460 (C), a full bench of the Court expressed the view that *prima facie* it is undesirable to inhibit attorneys-general, and those delegated by them to prosecute, in the bona fide performance of their constitutional duty by the "*spectre of costs being ordered against the state when prosecutions fail, appeals succeed or applications they resist are granted*" (our emphasis). In the case of an interlocutory application there is even less reason to consider granting a costs order against an attorney-general."[7]

The Commission appears before the Tribunal as prosecutor.[8] In practice there is generally nothing said about a prosecutor who

[7] Supra note 1 at para 11.
[8] *Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd and Another* 2003 (3) SA 64 (SCA) at 71.

withdraws a case on the day of the trial. Why should it be any different with the Commission?

[19] In English law a number of authorities have been cited concerning the approach to applications for costs against a regulatory authority. Lord Bingham of Cornhill CJ, giving the principal judgment in *City of Bradford Metropolitan District Council v Booth* [2000] COD 338 at paras 23-26, distilled the relevant principles as follows:

> "I would accordingly hold that the proper approach to questions of this kind can for convenience be summarised in three propositions:
>
> 1. Section 64(1) confers a discretion upon a magistrates' court to make such order as to costs as it thinks just and reasonable. That provision applies both to the quantum of the costs (if any) to be paid, but also as to the party (if any) which should pay them.
>
> 2. What the court will think just and reasonable will depend on all the relevant facts and circumstances of the case before the court. The court may think it just and reasonable that costs should follow that event, but need not think so in all cases covered by the subsection.
>
> 3. Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both (i)

> the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour, and (ii) the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged."

[20] I therefore find that the Tribunal was correct in finding that costs cannot be granted against the Commission, but this court may, in terms of section 61 (2) of the Act, make an order for the payment of costs against any party in the hearing, or against any person who represented a party in the hearing, according to the requirements of the law and fairness.

[21] In this case, it becomes apparent that the Commission should have realized the possible problems it would encounter with consolidating the two complaints. However this does not mean that the Commission acted maliciously or recklessly. The Commission explained that it had attempted to set down the application for an earlier date but had been unsuccessful. The fact that the consolidation application was withdrawn a day bearing the hearing is somewhat disconcerting but one has to also consider the circumstances and pressure under which the Commission operates. The efficiency of the Commission in rendering its duties could be severely affected if its every misjudged decision is scrutinized. In any event, any preparation done for the consolidated hearing will

not be wasted since the Commission has not withdrawn against Omnia and such preparation. The consequent costs occasioned by such preparation will not be wasted when the matter finally serves before the Tribunal.

[22] It is for the above reasons that the appeal is dismissed. Consideration of fairness demands that there will be no order as to costs.

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PATEL JA

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DAVIS JP and DAMBUZA AJA concurred