IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC Case No. 67/CAC/Jan07

TWK AGRICULTURE LIMITED **Applicant**

And

THE COMPETITION COMMISSION **First Respondent**
NCT FORESTRY CO-OPERATIVE LIMITED **Second Respondent**
SHINCEL (PTY) LTD **Third Respondent**
SHIELD OVERALL MANUFACTURERS (PTY) LTD **Fourth Respondent**

JUDGMENT: 7 August 2007

DAVIS JP:

[1] This is an application for an order reviewing and setting aside the decision by first respondent ('the Commission') to approve the acquisition by second respondent of control over third respondent and/or fourth respondent and consequently the setting aside of a merger clearance certificate issued under case No.2006/AUG/2478.

[2] The application for review has been brought in terms of section 62(2), alternatively section 62(1) of the Competition Act 89 of 1998('the Act') on the basis that the Commission, in exercising its powers acted irregularly and accordingly beyond the jurisdiction conferred upon it by the Act.

Background.

[3] On 29 August 2006 second and fourth respondents notified the Commission of an intermediate merger. Prior to the merger , second respondent held a 45% interest in third

respondent, the remaining 55% of the shares being held by fourth respondent. In terms of the proposed merger which was notified to the Commission, second respondent was to acquire the remaining interest in third respondent , thus ensuring that it would have sole control there over. This merger caused concern to applicant and its members and it therefore exercised rights under section 13 B(3) of the Act and submitted information in a letter to the Commission on 18th September 2006. This letter is annexure "A" to the applicant's founding affidavit.

[4] The following passages of annexure "A" of particular relevance: 'It has become clear to TWK that NCT has adopted a strategy of building up a dominant market share in woodchip export facilities. NCT will increase its dominant market share of the woodchip export facilities and this will lead to substantial lessening of competition at the procurement level. NCT's market dominance in the market for procurement of hardwood pulpwood logs will increase as a result of fact that there are limited distribution channels for the sale of hardwood pulpwood logs. The only major purchasers of hardwood pulpwood logs in South Africa are the wood chipping export facilities and the pulp and paper manufacturers namely Mondi and Sappi … The small timber growers had no negotiating powers against these large companies and therefore co-operatives were created to assist the small timber growers in their negotiations with the large purchases of hardwood pulpwood, logs ….The timber growers only viable alternative distribution channel for the sale of hardwood, pulpwood log is to sell to woodchip facilities for export purposes…. The control of the woodchip export facilities is crucial for the sustainability of the businesses of the timber growers to be able to access the

international market for the sale of hardwood chips and presents an opportunity to escape the monopolistic purchasing power of Mondi and Sappi. Any person who controls a dominant share of the wood chip export facilities will similarly be able to exercise market power in relation to the purchase of hardwood, pulpwood, logs for chipping and export…. TWK is concerned that NCT's control over a dominant share of the independent woodchip export facilities in South Africa will lead to an abuse by it of its position to the detriment of TWK and its members. NCT's increased dominant position will be detrimental to timber growers in South Africa who are not affiliated to NCT since they may be subjected to discriminatory pricing practices and their distribution channel may be foreclosed upon…..'

[5] After its initial written submissions to the Commission, applicant's attorneys arranged a meeting with the Commission's investigators. On the 28th September 2006 a meeting took place and the applicant explained in full the concerns which it initially had articulated in its letter of 18 September 2006.

[6] In its report to the Executive Committee , the Commission's representatives recorded 'a complaint' lodged by applicant. Nonetheless as Ms Blignaut , the Manager of the Merger and Acquisitions Division of the Commission said in her answering affidavit: 'As a result of the research conducted in the course of the investigation, the Commission formed the view that there would be no substantial change in market structure as a result of the merger. In addition, the Commission was mindful of the fact that only about half of the logs produced by TWK are processed through CTC, with the other half being sold

independently, giving TWK alternatives to selling through CTC…The Commission accordingly concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in the market for the export of hardwood chips.'

[7] A flurry of correspondence then ensued between applicant and the Commission concerning the reasons for the Commission's decision. Upon examination of the full report submitted to the Executive Committee of the Commission, applicant contended that the Commission had not fully evaluated its concerns. In particular, applicant contended that the Commission had failed to consider whether there was an alternative market definition relevant to the merger. No other market definitions were discussed Hence, applicant contended that there was no evidence of a consideration of the procurement market ; that is the upstream market in respect of the wood used by the wood chipping operations. Applicant therefore contended that an examination of the reasons for its decision provided by the Commission confirmed its failure to consider certain relevant markets including the South African procurement market.

[8] Applicant thus contended that the decision of the Commission should and ought to be reviewed on grounds which were all recognized in the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), being that the Commission failed to provide adequate reasons for its decision to approve the merger, to act rationally in approving the merger, failed to take relevant considerations into account in the approving of the merger and acted arbitrarily and capriciously.

[9] Before the question of review can be considered however, applicant had to negotiate the hurdle of jurisdiction; that is that was it entitled to approach this Court without an initial recourse to the Tribunal?

JURISDICTION.

[10]In its initial argument, applicant relied on two sections of the Act to justify the argument that this Court had jurisdiction, being section 62(1) and 62(2) of the Act. In oral argument Mr Brassey, who appeared together with Ms Engelbrecht on behalf of the applicants, relied almost exclusively on section 62(2) to support his argument.

[11] Section 62(2) provides as follows:

'In addition to any other jurisdiction granted in this Act to the Competition Appeal Court, the Court has jurisdiction over –

(a) the question whether an action taken or proposed to be taken by the Competition Commission or the Competition Tribunal is within their respective jurisdictions in terms of this Act.

(b) any constitutional matter arising in terms of this Act.

(c) the question whether a matter falls within the exclusive jurisdiction granted under subsection (1).'

[12] Mr Brassey contended that, in terms of section 62(2)(a) , this Court had jurisdiction 'over the question whether an action taken or proposed to be taken by the Competition Commission…is within [its] jurisdiction'. He therefore contended that the section conferred jurisdiction upon this Court as a court of first instance to decide jurisdictional issues with respect to the Commission. By contrast, he submitted that the Tribunal had

no power to determine these jurisdictional questions. Nor could it be expected that a body which was inferior to a court of law should have such review powers.

[13] By contending that the Commission acted unreasonably, irrationally and beyond the scope of the Act and hence ultra vires the powers conferred upon it by the Act, Mr Brassey submitted that the Commission had not acted within its jurisdiction. For this reason , section 62(2) empowered this Court to review the decision of the Commission.

[14] Mr Brassey submitted further that there was no viable distinction which could be drawn between the authority of the Commission and the exercise of this authority. Failure to exercise its authority properly , for example by taking into account extraneous facts, meant that it had acted outside of its jurisdiction.

[15] Mr Rogers ,who appeared together with Mr Gotz on behalf of second to fourth respondents, submitted that section 37 (1) of the Act specifically empowered this Court to review any decision of the Tribunal. Accordingly the interpretation contended for by Mr Brassey in respect of section 62(2) would render one of these sections redundant. Section 62(2) clearly granted this Court jurisdiction over any action taken or proposed to be taken by the Competition Tribunal. Were the phrase 'within their respective jurisdictions in terms of this Act ' to include the usual forms of review, section 37 which provided this Court with the power to review the Tribunal would not be necessary in that the very same review power would already have been located in section 62(2). It would make no sense to have introduced specific review powers in section 37 as had occurred

when section 37 was amended in terms of the Competition Amendment Act of 2000 when section 62(2) already provided the very same powers of review.

[16] Mr Rogers pointed out that section 37 had been introduced because there had been a lacuna in the Act. Before the introduction of this section into the Act, **Schutz JA ,** on behalf of a unanimous court, held in Simelane and Others NNO v Seven –Eleven Corporation SA (Pty) Ltd and Another 2003 (3) SA 64 (SCA) at para 2 : 'The reason why the review application could be brought in the High Court was that at the time of its institution, the Act did not confer review powers on the tribunal, although it had exclusive jurisdiction in respect of matters of the kind with which this case is concerned (s 65(3) of the Act) [this is the equivalent to section 62(1) of the present Act] . Although the Competition Appeal Court (also a creation of the Act) had exclusive appellate and review powers over the tribunal's decisions (s 65(4)), it also did not have review powers in respect of the commission. Accordingly the High Court at the time of institution retained its common-law review jurisdiction'. Significantly, section 27(1)(c) provided by way of an amendment in terms of the Competition Second Amendment Act of 2000 that 'the Competition Tribunal may hear appeals from or review any decision of the Competition Commission that may, in terms of this Act, be referred to it .'

[17] In summary, Mr Rogers submitted that a specific review power had been given to the Tribunal over the decisions of the Commission and a specific review power had been granted to the Court in terms of section 37 to review the decisions of the Tribunal but not the Commission. The word 'review' had been employed in both of these sections in contrast to the word 'jurisdiction' which was used in section 62(2). In his view, the

meaning of the word 'jurisdiction' should be contrasted with the use of the word 'review' as contained in sections 27 and 37 respectively which had been specifically introduced in response to the **lacuna** in the pre 2000 Act.

[18] In response, Mr Brassey contended that section 27 (1)(c) employed the words 'in terms of this Act' Nowhere in the Act was it made clear as to what powers of review of decisions of the Commission were possessed by the Tribunal. Further, it could not be held that the Tribunal possessed a residual power to review any decision of Commission. Mr Rogers countered this submission by contending that the phrase 'this Act' as it appeared in section 27(1)(3) was defined in terms in section 1(1)(i) of the Act which provided that 'this Act includes the regulations and schedules'. Regulation in turn was defined to be a regulation made under this Act. He therefore referred to the Competition Tribunal's Rule 42 which makes provision for reviews of decisions of the Commission. This rule can be found in Division E of the Competition Tribunal Rules which is headed 'Other appeals, reviews variations or enforcement proceedings'. Rule 42(1) provides for 'any proceedings not otherwise provided for in these rules' and Rule 42(3) refers to the Commission's decision that is being appealed or reviewed. In short, Mr Rogers submitted that there could be no doubt that Rule 42 permitted a referral or review of any reviewable decision of the Commission to the Tribunal.

EVALUATION.

[19] Applicant's submissions amount to the following:

The term 'respective jurisdictions in terms of this Act' as employed in section 62(2) of the Act essentially call into application the <u>ultra vires</u> doctrine as a main justification for

a general power of review and hence must be interpreted so as to provide this Court with a general power of review over 'any action taken or proposed to be taken' by the Commission or Tribunal.

[20] The role of the ultra vires doctrine in justifying judicial review has been the subject of a long running academic controversy in the United Kingdom. For example, Wade and Forsyth Administrative Law (2004) continue to insist that ultra vires remains the main justification for judicial review on the basis that Parliament intends administrators to conform their conduct and decision making to the principles of lawfulness , reasonableness and fairness. By contrast, Craig Administrative Law (2003) rejects the ultra vires principle as a residual product of Dicey's conception of parliamentary supremacy. He argues in favour of a common law model which views the principles of administrative review as being a product of a judicial process in terms of which judges have developed standards for administrative conduct. See also Craig 1999 Public Law 428 and a more recent examination of this subject by Jeffrey Jowell 2006 Public Law 562.

[21] Since the decision in Pharmaceutical Manufacturers of South Africa:In re: Ex Parte Application of President of RSA 2000(3) BCLR 241 (CC) at para 50, it is clear that the source of judicial review is to be found in the Constitution. As Mr Cockrell, who appeared on behalf of first respondent, noted, section 33 of the Constitution of the Republic of South Africa 108 of 1996 (the Constitution) reads:

'Everyone has the right to administrative action that is lawful, reasonable, and procedurally fair.'

A distinction is therefore drawn in the Constitution between lawfulness, reasonableness and fairness. It would thus appear that the Constitution does not promote the argument that the concept of lawfulness subsumes all forms of review under its scope. This distinction is given clear legislative content in s 6 of PAJA where the power of a court or tribunal to review administrative action where the administration was not authorized to do so by the empowering provision, (s6)(2)(a)(i)) stands as a separate ground to a review where the action was taken arbitrarily or capriciously. (s6(2)(e)(vi)) .

[22] Consequently, the approach contended for by Mr Brassey that acting 'within their respective jurisdictions' covers all grounds of review, at the very least, is not supported by PAJA which has given legislative form to s33 of the Constitution regarding the source of judicial review. That may not be the end of the applicant's argument , were the wording of the Act to afford clear contrary support.

[23] However , the attempt to locate the source of all review of the Commission's actions within section 62(2) of the Act requires a strained interpretation of this provision . Given that section 27(1)(c) and section 37(1) of the Act which provide for review powers to both the Tribunal and the Court in circumstances where no such review power had existed prior to the 2000 amendment to the Act, it places an anomalous construction on these sections to contend that, when Parliament passed an amending provision to ensure that the Tribunal or this Court had review powers, it sought to do no more then duplicate the very review powers provided for in section 62(2) of the Act. To the extent that Mr Brassey contends that s27(1) (c) is of no assistance to

respondents because in terms thereof the Tribunal can only review a decision of the Commission 'that may in terms of the Act, be referred to it' and that no such provision exists in the Act for such referral, there are two clear responses to this submission both of which applicant was unable to counter: Firstly, as Mr Rogers submitted, the phrase 'this Act' , as it appears in section 27(1) (c), is a defined term which includes the regulations and schedules (section 1(1) (i)). Rule 42(3) of the Tribunal Rules refers to the decision of the Commission that is being appealed or reviewed . This rule clearly envisages the possibility of a review by the Tribunal of the decision of the Commission.. Secondly, the linguistic attack on s27 omits to consider the foundational point , being that s27(1) (c) specifically employs the term ' review' which would make no sense, were s62(2) to be interpreted to cover all forms of review, which could conceivably be undertaken by the Tribunal. Why the need for two sections dealing with the same power?

[24] There is a further problem with the approach contended for by applicants. As Mr Rogers correctly noted , the structure of the Act is designed to ensure that this Court is ,as it name suggests, an appeal court. Were Mr Brassey to be correct, this court would be a court of first instance insofar as the review of decisions of the Commission were concerned. It would not have the benefit of the considered decision of a specialist body, being the Tribunal . In this way , applicant's interpretation would undermine the careful construction of the competition institutions as provided for by the Act.

[25] Although Mr Brassey did not press the point, he did not abandon his submission that a further source of jurisdiction can be found in section 62(1) of the Act which reads thus:

'The Competition Tribunal and Competition Appeal Court share exclusive jurisdiction in respect of the following matters:

(a) interpretation and application of Chapters 2,3 and 5, other than –

(i) a question or matter referred to in subsection (2); or

(ii) a review of a certificate issued by the Minister of Finance in terms of section 18(2); and

(b) the functions referred to in sections 21(1), 27(1) and 37, other than a question or matter referred to in subsection (2)'

[26] Mr Brassey submitted that this court's jurisdiction under section 62 was said to be shared with the Tribunal. If a jurisdiction was shared between two bodies, then he contended that at the election of an applicant, either could be approached to exercise jurisdiction. In the present case, it appeared that the Tribunal could not be approached at all since it only had jurisdiction over reviews that may 'in terms of the Act' be referred to it. No provision was made in the Act for the referral to the Tribunal of a review of a merger decision taken by the Commission.

[27] On its own however, section 62(1) does not confer jurisdiction on this court. Whatever doubt there might have been with regard to this question, the matter was settled by the Supreme Court of Appeal in **Simelane and Other NNO** v **11 Corporation SA (Pty) Ltd and Another** 2003 (3) SA 64 (SCA) at para 2 in the passage of the judgment

of Schutz JA cited above. Section 65, to which Schutz JA made reference, became section 62(1) of the present Act. As the Supreme Court of Appeal has held that neither the Tribunal nor this Court had review powers in respect of the decision of the Commission in terms of section 65(3) , it clearly cannot be argued that the same section now numbered section 62(1) can be a source of jurisdiction.

MERITS.

[28] On the basis of the finding to which I have come, there is no need to deal with the merits of this case. There has however been some confusion as to the role of this Court under the Act; in particular a lack of understanding of the difference between an appeal and a review. For this reason it may be useful to make some brief comments on the merits of this dispute in order to provide guidance to those commentators who may have misunderstood this important distinction. Unlike the majority of cases which come before this Court, being appeals arising from the Tribunal (37(1)(b) of the Act), this case has been brought on the basis of a review. Cameron JA has luminously illustrated the important distinction between review and appeal in Rustenburg Platinum Mines Ltd v The Commission for Conciliation, Mediation and Arbitration 2007(1) SA 576(SCA) at para 30-31 as follows:

'The question on review is not whether the record reveals relevant considerations that are capable of justifying the outcome. That test applies when a court hears an appeal: then the inquiry is whether the record contains material showing that the decision – notwithstanding any errors of reasoning – was correct This is because in an appeal the

only determination is whether the decision is right or wrong…In a review the question is not whether the decision is capable of being justified…..but whether the decision-maker properly exercised the powers entrusted to him or her."

[29] The objections to the Commission's decision by applicant have already been set out in this judgment. In the Commission's report the following paragraph sought in particular to deal with the complaints raised by applicant:

> '5.6 Complaint
> There has been a complaint lodged to the Commission by TWK (who hold a 26% stake in CTC)regarding this transaction.
> TWK argues that the market definition should not be regarded as international but as the market for the ownership of independent wood chipping facilities in South Africa and the rendering of service thereto.
> TWK also informs the Commission that since two of thee four independent wood chipping facilities are already under the sole control of NCT post-merger it will control three – resulting in a market structure with only two players, Mondi and NCT
> The Commission is also informed that NCT opened the Durban hardwood chipping facility (NCT DWC) in order to divert pulpwood logs away from CTC. TWK argues that this action will eventually lead to the closure of CTC. It was also stated that there is a deadlock between NCT and TWK (the two owners of CTC) in relation to the management of CTC and there is currently a case underway in court.
> The Commission addresses each of these concerns in turn.
> With regard to the first concern, as already argued in section 5.2 above, there is no evidence that the domestic market for hardwood chip is thriving. Virtually the entire production of hardwood chips are exported to international markets, with the two only domestic buyers being self sufficient and not selling in the open market except in cases of excess production.
> The concern about the proposed transaction leading to a duopolistic market structure post-merger seems to exaggerate the actual effect of this transaction on the market. Pre-merger NCT already has stakes in three of the four players in the market , the only change post-merger is that it will own one of these three entities 100%
> The third concern implies that any diversion of logs away from CTC by NCT will render the former unable to fulfill its export orders. The Commission established that TWK supplies only half of the pulpwood logs that are processed through CTC, with the remainder being filled by NCT. The rest of the logs are marketed independently of CTC, meaning therefore that tree growers who are members of

> TWK have other avenues of selling their product if CTC were to fail. With regard to the management of CTC, the Commission is of the view that it is not a competition matter and therefore no further comment is warranted.' (my emphasis)

[30] This response should be viewed against the two main objections raised by applicant against the decision of the Commission, namely the appropriate definition of the market and whether the merger would cause harm.

[31] In its report, the Commission deals both with the relevant product market and the geographic market. It concluded that the relevant product market was that of production and sale of hardwood chips. It concluded that the relevant geographic market is at least international and could be limited to Japan , given that Japan accounted for over 90% of the international hardwood chips trade. In dealing with the complaint regarding market definition, the passage reproduced in this judgment headed 'Complaint' sets out applicant's objection as the latter had described it in its own letter of 4 October 2006. Furthermore , as Mr Rogers noted , there was little evidence provided in the complaint of a lessening or reduction of competition in the upstream market which would justify a different decision being taken by the Commission.

[32] Without deciding this aspect of the case , it is clear that there are powerful arguments raised by respondents as to the justification for the decision adopted by the Commission . To recapitulate: were this Court to have jurisdiction, it would be required to decide whether the Commission had properly exercised the powers entrusted to it to make a determination and further that it had applied its mind to the matter in arriving at

a reasonable decision. In addition, consideration would have to be given to the particular expertise of the Commission in competition matters of this nature. It is here that the principle of deference to the expertise of the Tribunal or the Commission would apply. This is very different enquiry to an appeal when the court must consider whether the record of evidence contains material which reveals that the decision of the lower body was correct. In such a case, this Court would apply its own view as to the correct decision based on the evidence placed before it. The fact that this Court would read the record of evidence and then, after argument from the parties , arrive at its own decision is in the very nature of an appeal. In a case where the Tribunal's decision is based upon a technical explication of economic evidence, respect in the jurisprudential sense, must be shown to that bodies' expertise but even here, the decision on appeal is that of the court , based on its evaluation of the evidence and applicable law. By contrast, as indicated, a court has a far narrower remit in the case of a review where it must be particularly cognizant of the role, function and expertise of the administrative body.

[33] To sum up: for the reasons already advanced in this judgment, this Court is not possessed of the requisite jurisdiction to hear this form of application for review as a court of first instance This is a matter that should have been brought properly before the Tribunal. Accordingly, the application is dismissed with costs, including the cost of two counsel.

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DAVIS JP

Patel and Mhlantla AJ; JA concurred