IN THE COMPETITION APPE1 COURT OF SOUTH AFRICA

CASE 12/CAC/DEC01

In the matter between

AMERICAN NATURAL SODA ASH CORPORATION First Appellant

CHC GLOBAL (PTY) LTD Second Appellant

and

COMPETITION COMMISSION OF SOUTH AFRICA First Respondent

BOTSWANA ASH (PTY) LIMITED Second Respondent

CHEMSERVE TECHNICAL PRODUCTS **Respondent**

THE MINISTER OF TRADE AND INDUSTRY Fourth Respondent

JUDGMENT

DAVIS JP

This is an application for leave to appeal to the Supreme Court of Appeal against the judgment of this Court delivered on the 25th of October 2002, dismissing an appeal of the applicant. Briefly, this Court confirmed the decision of the Competition Tribunal ('the Tribunal'), to the effect that the second and third respondents had *locus standi*, to approach the Tribunal for relief which they sought against the Applicant. The Court further upheld the decision of the Tribunal, that the wording of Section 3(1) of the Competition Act 89 of 1998 (The Act), supported the conclusion that the Act applied to all economic activity having an effect within the Republic and that there was no basis for reading the section narrowly by way of reading in the qualification of any effect of a non-competitive nature. The Court also upheld the decision of the Tribunal to the effect that Section 4(1)(b) of the Act rendered unlawful the setting of a selling price regardless of whether conduct which fell within the section could be justified on efficiency grounds.

The Applicant then sought to appeal this judgement to the Supreme

Court of Appeal. The matter was heard by the Supreme Court of Appeal, which handed down judgement on 2 June 2003. Farlam JA, held (at paragraph 15) that "The objection raised by all three respondents, namely that the present application must be dismissed because the applicants did not first ask the Competition Appeal Court for leave to appeal was well taken."

In short, the judgment of the Supreme Court of Appeal, justifies the conclusion that the sole issue upon which this Court is now called to adjudicate, turns on the question as to whether there is reason to grant leave to appeal to the Supreme Court of Appeal. The determination of the scope of the question before this court is important in that applicants have urged this court to opine upon the issue as to whether an appeal lies in law to the Supreme Court of Appeal. In my view, it does not appear to be appropriate for this Court to opine on whether in terms of Section 62(1) of the Act, the ouster of the jurisdiction of the Supreme Court of Appeal is constitutional. The crisp question for decision for this Court this morning concerns reasons to grant leave to appeal.

The Court has been fortunate to be provided with extremely competent and eloquent heads by Mr Brassey and Mr Cockrell on behalf of the applicants, and Mr Unterhalter and Mr Gotz on behalf of the second and third respondents. Before dealing with the three issues which give rise to this application mention must be made of the arguments placed before this Court regarding the appropriate test for leave to appeal.

In general, as Mr Brassey correctly contended, the test that applies in an application for leave to appeal is whether there are reasonable prospects of success on appeal. In other words the general principal is that "leave is granted if there are reasonable prospects of success", Zweni v Minister of Law and Order 1993 (1) SA 523 (A) 531 C to D.

The particular question which has been raised is whether a stricter test should apply in the case of an appeal from this Court; that is, a test which generally applies when special leave to appeal to the Supreme Court of Appeal is granted against the judgment of a full bench of the High Court, in terms of Section 20(4) of the Supreme Court Act 59 of 1959. In

the case of such an appeal it is not sufficient for an applicant merely to show that there are reasonable prospects of success. An applicant is required in addition to show that there are special circumstances that would merit a further appeal to a Supreme Court of Appeal.

The jurisprudence in regard to his test is captured in Westinghouse Brake and Equipment (Pty) Ltd and Bilger Engineering (Pty) Ltd 1986 (2) SA555 (A). Given the approach which I adopt to this matter, it is not necessary to make a final determination in this regard. Suffice it to say that although there is no textual support in terms of Section 62 to justify the application of the stricter test, the fact is that the constitutional difficulty which has been raised by the applicant, is not one that was confronted by the drafters of the Act. The constitutional problem turns on whether the ouster in terms of Section 62 is valid in the light of Section 168(3) of the Constitution of the Republic of South Africa 108 of 1996. Thus the Act never envisaged the kind of deliberation with which we are engaged this morning and hence I am not certain whether the absence of a textual basis for applying the strict test can be definitive of the question. I might also add that the very structure of the Act was designed to establish a hierarchy of decision-making commencing with the administrative actions of the Commission, the determinations of the Tribunal and a right of appeal to this Court. Furthermore the purpose behind the establishment of the Tribunal and this Court was to create suitably qualified for a to deal with this extremely complex and novel area of law. In itself, the role of this court may well constitute a basis for the conclusion that the stricter test is appropriate. However it is not necessary to determine this issue at this stage.

I turn to deal with the three matters of substance. Section 3 of the Act, as the judgment of this Court made clear is phrased in very clear language. It provides that this Act applies 'to all economic activity within, or having an effect in, the Republic except -'

On the applicants argument the Competition Commission, or indeed any party which brings a complaint, will have to prove that the economic activity of a party in the position of the applicant has a substantial negative effect on competition within the Republic before the Tribunal can apply the substantive provisions of the Act. It does not appear to be disputed that in this particular case the applicants engage in "economic activity, which may have an effect in South Africa". They seek to have words read into Section 3(1), the phrase 'have a deleterious or negative effect on competition'. The applicants contend that the words "in effect" in Section 3(1) should be read purposively to connote "an anti-competitive effect".

A purposive approach to interpretation is not merely a mantra to be waived in desperation when an unsuccessful party is faced with clear and

unambiguous words of a section. Agreed, words must be given a meaning within a particular context but where the meaning within the context is clear, that is the end of the matter. In this particular case, the legislature has expressed itself by way of the employment of a phrase which manifestly fits the purpose of the Act, namely that the Act envisaged an application to a wide range of activities, being all economic activity which has an effect within the Republic. This approach then allows the competition authorities to have jurisdiction to deal with questions, which may (or may not) finally be determined in relation to anti-competitive effects. Were the words to be written into the Act by way of implication as urged by the applicants, then, as the judgment of this Court has already noted, this form of wording would render the various tests contained in Sections 4(1)(a) and 5(1) redundant. In short, there would have already been a determination of the anti-competitive effects in terms of section 3, long before the investigation mandated by the specific section of the Act could be instituted. The question must then be raised, why would a duplication of the anti competitive test be mandated by the Act? This question poses an even more formidable hurdle for applicants when the clear words of the section crisply dictate a conclusion to the contrary.

In my view, the Act is clear and the judgment of this court interpreted the section in a manner whereby there is no reasonable prospect that another court would come to a different interpretation, even on the more generalised test for leave to appeal. The application in this regard must fail.

Turning to Section 4, there is a measure of curiosity in the manner in which this application against the decision of the Court in respect of this section had been brought. In their argument the applicants concede that the Tribunal defined the issue which it had to decide as, "does Section 4(1)(b) allow for an efficiency defence?" he Tribunal decided that the wording of the section did not permit an efficiency defence. The applicants concede in their heads of argument, ' that the unsurprising conclusion on the issue as so defined is "No". The conclusion is self-evident in the distinction between the rule of reason analysis mandated by s 4(1)(a) and the *per se* analysis implicit in the prohibitions imposed by Section 4(1)(b)".

One would have thought that was the end of the matter, but it is not. The applicants seek to develop a range of further arguments which they say are definitive of the question. They argue that, before as opposed to once a transgression of Section 4(1)(b) can be established, the Court must determine whether the conduct complained of falls within the ambit of the section. This particular argument which entails a process of characterisation, would then result in a conclusion that in the case of an open, transparent and legitimate joint venture corporation created to promote trade and achieve efficiencies (this is the manner in which Applicants have described their activities), the competitive effects of this conduct would trump the complainant's contention that this form of joint venture should be struck down.

Section 4(1)(b), does entail some fact based analysis to conclude whether the situation is one which is contemplated by the *per se* prohibition. Once the conduct envisaged in the section is determined there is no need for scrutiny on the basis of the rule of reason test in sub-section (a). This statement requires some examination of the applicable section .

Section 4(1) provides that *an agreement between, or concerted practice by, firms, or a decision by an association of firms is prohibited if it is between parties in a horizontal relationship and if –*

a) it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice or decision can prove that any

technological efficiency or other pro-competitive gain resulting from it outweighs that effect; or

b) it involves any of the following restrictive horizontal practices:

i) directly or indirectly fixing a purchase or selling price or any other trading condition;

ii) dividing markets by allocating customers, suppliers or territories or specific types of goods and services;

iii) collusive tendering.

It is clear that the textual differences between section 4(1)(a) which contains an expressed proviso and section 4(1)(b) which does not manifest incorporates a body of comparative competition law which in effect can be termed the *per se* and rule of reason approaches to competition law. In short, section 4(1)(a) incorporates within the context of South African law, a rule of reason approach to these matters, whereas Section 4(1)(b) envisages a *per se* approach

Where an impugned agreement falls within the ambit of Section 4(1)(b), the Court has to ask the question prefigured in the express words of the provision namely: 'Does the agreement involve price fixing, the fixing of trading terms and conditions, a market sharing arrangement or conducive tendering? If it does, then the agreement is hit by the prohibition in Section 4(1)(b) and the prohibition applies. If it is found that the agreement does not involve any of these activities, then the conduct is not immune to scrutiny and falls to be assessed under the rule of reason in terms of Section 4(1)(a).

Were this Court to adopt the approach urged upon us by the applicants, it would in effect be blurring the distinction between *per se* and rule of reason and effectively render Section 4(1)(b) a form of the rule of reason approach. A court would first have to investigate whether there were justifications for the practice and then conclude, if there were not, that it was *per se* prohibited. That however is not the way *per se*

jurisprudence works, nor does it reflect the clear intention of the Act which adopted a clear policy choice. The policy choice it made was to highlight three separate forms of activity being price fixing, dividing up of markets and collusive tendering, which, as with much comparative competition law, are regarded as egregious activities of a kind, which competition authorities must prohibit. There is nothing odd about this policy. A division and the section is clearly unambiguous in its establishment of these set of principle

In my view, there is no basis by which another Court could reasonably come to a different interpretation to the structure of Section 4(1)(a) and (b) so as to justify the arguments which have been urged upon us by the applicants.

I now turn to the third issue, which is the question of the *locus standi*.

Section 53 of the Act provides *inter alia* that:

(1) The following persons may participate in hearing the person or through a representative and may put questions to witnesses in respect of any documents or items presented at the hearing.

(a) The hearing is terms of Part C –

(ii) the Complainant if:

aa)the Complainant referred the complaint the Competition Tribunal;

bb)in the opinion of the presiding member of the Competition Tribunal, the Complainant's interests is not adequately represented by another participant and then only to the extent required for the Complainant's interest to be adequately represented.

It is trite that in common law, the test of a direct and substantial interest in the subject matter of the action is decisive. Our Courts have followed this approach, particularly as articulated in Henri Viljoen (Pty) Ltd v Awerbuch,Brothers 1953(2) SA 151 (O) Act 169, namely an interest in

the right which is the subject matter of the investigation, which in common law does not mean merely a financial or commercial interest.

Section 53(1)(a) does not require that a complainant show a direct and substantial interest or indeed a material interest in the sense adopted in common law. It contemplates a showing of an interest not adequately represented by another participant and then only to an extent required for the Complainant's interest to be adequately represented. The second and third respondents are complainants and they submitted a complaint against the Applicant. To show an interest, as Mr Unterhalter correctly submitted, the applicant for leave to intervene must establish some interest in the outcome of the proceedings. It must establish that it has an interest, cognisable by the competition authorities, which may be effected by the Tribunal's decision regarding the matter. It therefore follows that the Act recognises that there is a need, on occasion, to protect an interest different from the general public interest. That interest must be an anti-trust one .It necessary follows that the Act serves not just to protect the general public interest but will express the anti-trust interest of different class of persons including customers, competitors, suppliers and consumers, as envisaged in Section 2 of the Act, which also includes the interest of the historically disadvantaged.

Even were this Court to adopt the test of Patz v Greene 1907TS 424, where a reading of the Act or from such a reading within the context of the likely surrounding circumstances, it can be concluded that an act is prohibited in the interest of the class of persons, any member of that class may seek the intervention of a Court to enforce the prohibition without proof of special damages, for the damage will be presumed.

In my view, Section 4(1)(b) is clearly designed to protect the interest of several classes of persons, namely customers, competitors and suppliers, from such forms of agreement. Section 53 confirms that such interests are cognisable under the Act and for this reason whether on an interpretation of Section 53, or by application of the rule articulated in Patz v Greene, the second and third respondents have a right to approach the competition authority, including the Tribunal and this Court. For this there is, in my view, is no reasonable prospect that another Court

would adopt the kind parsimonious approach to standing, as urged upon us by the Applicants.

For these reasons the application for leave to appeal on all three grounds, should be dismissed, whether or not this court were to adopt the generalised, as opposed to the stricter test for leave to appeal.

The application for leave to appeal is dismissed, and the costs of this appeal which in the case of the second and third respondents includes the costs occasioned by the employment of two councils are to be borne by applicants

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Davis JP

Jali JA and Malan AJA concurred.

30 October 2003

APPEARANCES:

For the Applicant:

Adv M S M Brassey SC
instructed by J Y Meijer of Cliff Decker Inc

For the First Respondent:

Adv W Pretorius
instructed by the Legal Services Division of the Competition Commission

For the Second and Third Respondents:-

IN THE COMPETITION APPE10 COURT OF SOUTH AFRICA

Adv D Unterhalter SC and Adv A Gotz
instructed by Martin Versveld of Webber Wentzel Bowens