IN THE COMPETITION APPEAL COURT

OF SOUTH AFRICA

Case No: 09/CAC/MAY 01

In the matter between:

YORK TIMBERS LIMITED

Appellant

and

SOUTH AFRICAN FORESTRY LIMITED

Respondent

JUDGMENT

MAILULA AJA:

1. Introduction.

1.1 The appellant instituted an application against the respondent in terms of section 49C of the Competition Act No. 98 of 1998, as amended, ("the Act") for a wide range of relief. To the extent that it is relevant for the purposes of this appeal, the critical issue before the Competition Tribunal ("the Tribunal") concerned the following prayer in the notice of motion:

> "8.1. **an interdict in terms of Section 58(1)(a)(i),** alternatively Section 60(a)(i) of the prior Act, restraining the respondent from persisting in the aforesaid prohibited practices of refusing to supply softwood sawlogs from Witklip and Swartfontein plantations, alternatively of

threatening, to reduce the supply of sawlogs to the Applicant from 6675m^3 to 2222,2m^3 per month.

8.2. **an order in terms of section 58(1)(a)(ii) of the Act,** alternatively Section 60(a)(ii) of the prior Act, ordering SAFCOL, to supply the Applicant at least 6,675 cubic meters per month of softwood sawlogs from Witklip and Swartfontein plantations; or substantially the equivalent thereof as was supplied since the conclusion of the so-called ad hoc arrangement dated 14 September 2000."

1.2. The Tribunal, having dismissed the application, the appellant now appeals against the judgment and order which the Tribunal delivered on 9 May 2001.

2.The Appeal.

The questions which this Court has to consider on appeal are:

2.1. Whether the Tribunal erred in:

2.1.1. finding that there was no "refusal to supply as contemplated in Section 8(d)(ii) of the Act;

2.1.2. concluding that even if it could be said that the refusal to supply has been established, that it has not been shown that this constitutes a prohibited practice under the provisions of Section 8(d)(ii);

2.1.3. finding that, as the dispute was a contractual and not a competition issue, it did not have the necessary jurisdiction;

2.1.4. relying on a work of Areeda and Hovenkamp, which dealt with American anti-trust law, to arrive at the conclusion that the appellant failed to show abuse of dominance on the part of the respondent.

2.2. In the event of this Court finding that the Tribunal was wrong, the next question with which the Court is required to decide, is whether the applicant has satisfied the requirements of Section 8(d)(ii) and if so, whether the

appellant has discharged the onus borne by it in terms of Section 49C of the Act.

3.1. Section 49C provides that:

> "(1) ...
>
> (2) The Competition Tribunal -
>
> (a) ...
>
> (b) may grant an interim order if it is reasonable and just to do so having regard to the following factors:
>
> (i) the evidence relating to the alleged prohibited practice;
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> (ii) the need to prevent serious irreparable damage to the applicant; and
>
> (iii) the balance of convenience."

3.2. In short, to obtain relief in terms of Section 49C, the appellant must first show the existence of a prohibited practice. Thereafter questions of irreparable harm, assessment of the balance of convenience and absence of an alternative remedy require examination.

3.3. The critical dispute concerning a prohibited practice turns on the interpretation of section 8(d)(ii) of the Act which provides that:

"It is prohibited for a dominant firm to -

(a) ...;

(b) ...;

(c) ...;

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act -

(i) ...;

(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;"

4. **The Essential Facts.**

Briefly, the salient facts pertaining to this acrimonious dispute were as follows:

4.1. The Department of Water Affairs and Forestry ("DWAF") and the appellant entered into agreement for the sale of softwood sawlogs in 1986 and again in 1976.

4.2. In 1992 the South African Forestry Company Limited ("SAFCOL") was incorporated in terms of Section 2 of the Management of State Forests Act No. 128 of 1992. In 1993 it succeeded DWAF as the seller of some of the State's sawlogs in South Africa, and took over a number of the long-term contracts between DWAF and various sawmills, including those pertaining to the appellant.

4.3. The appellant had entered into two long-term contracts with DWAF. SAFCOL now assumed the rights, and obligations from DWAF pursuant to these two long-term

contracts. The contracts entitled the appellant's sawmill, Nicholson and Mullin, situated about a kilometre from Witklip, Mpumalanga, to a supply of sawlogs from Witklip and Swartfontein plantations to the extent of a volume 2 000 000 (two million) cubic feet over five years.

4.4. When SAFCOL took over the plantation in 1993, the appellant had a guaranteed volume of 85 000m^3per annum from these plantations. At that stage the appellant was involved in price dispute with the respondent's predecessor.

4.5. In 1994 the parties entered into an agreement of settlement in terms of which it was agreed that the guaranteed sawlog volumes would remain at 85 000m^3per annum until 31 March 1997, and that thereafter the volumes would revert to 55 000m^3 annum.

4.6. The parties entered into another settlement agreement in 1996. They agreed on volumes of 75 100m^3 annum from Witklip and Swartfontein. The volumes of 75100m^3 to be supplied to the applicant from 1 April 1997 until 31 March 20002.

4.7. In 1998 SAFCOL purported to cancel the agreement after its endeavuors to raise prices were "frustrated" by the appellant. The Minister was, at some stage, requested to intervene but refused to do so. The validity of the cancellation is a subject of a separate dispute before the High Court.

4.8. On 14 September 2000 the parties entered into an ad hoc supply agreement terminable on 30 days notice in terms of which the appellant would pay for the sawlogs supplied the same price paid by other long-term customers of SAFCOL for the year 2000. The source and volume of sawlogs, i.e. 6675m^3 month from Witklip plantation, remained unchanged from the disputed long-term contracts.

4.9. On 14 February 2001 SAFCOL notified the applicant that it was no longer feasible to continue supplying the guaranteed volumes from Witklip plantation and that this would be reduced to 2222m^3 from 1 May 2001. It claimed that the reduction in volume supplies was necessary for the long-term sustainability of the plantation.

5. **The Finding of the Tribunal.**

5.1. The Tribunal found that the respondent was dominant in the market for sawlogs

in Mpumalanga. With regard to the case for sawn timber, the so-called downstream market, SAFCOL "has a relatively small market share and no evidence has been presented suggesting that it possesses anything akin to market power in the market.'

5.2. Relying upon a passage from Areeda and Hovenkamp's work **Anti- trust Law** (1996) at 172, the Tribunal found:

> " this dispute centers around an attempt by SAFCOL to improve the terms of its contract with York rather than an attempt to further its own market position by denying York supply on any terms. The former is a contractual issue; the latter is a competition issue. Hence SAFCOL's progressive exit from its contractual relations with York and its undertaking to continue supplying York with logs are not necessarily inconsistent. It is the contractual terms that SAFCOL find burdensome and from which it desires to escape. SAFCOL will be willing to accept York's custom as long as it is satisfied with the contractual terms. York may or may not have a solid basis in contract law for resisting SAFCOL's efforts to escape contractual obligations but this is not the forum for making that determination."

5.3. The Tribunal then held that, even if the respondent had refused to supply the appellant, it had failed to establish the conditions necessary to render the refusal an abuse of dominance. The Tribunal reasoned as follows:

> "Following Areeda and Hovenkamp, what is rather at issue is whether the dominant firm, SAFCOL, has attempted to use - or 'abuse' - its dominance to extend or preserve its dominant position, what US antitrust jurisprudence refers to as 'monopolisation'. Where the upstream market is concerned - that is the market for saw logs - this is clearly not the case. SAFCOL's dominance of the upstream market is unaffected by its alleged refusal to supply York - it was dominant before the alleged refusal and this position is not strengthened by its alleged refusal to supply the applicant."

5.4. With regard to the downstream market, the Tribunal concluded:

> "... we do not believe that the applicant has established an abuse of dominance, that is we do not believe that the respondent has, by its alleged refusal to supply York, extended, preserved, created or threatened to create power in the downstream market. This caveat - that, in order to find an abuse of dominance from a refusal to supply, market power must be shown to have been extended or created - is crucial if we are to give expression to the requirement of the Act to the effect that it is a refusal to supply a 'competitor' that offends. Action against a competitor only offends when it is anti-competitive and this will be measured by its capacity to extend or create market power."

5.5. The key issues on which the appeal then turns are whether

5.5.1. the respondent refused to supply scarce goods;

5.5.2. in circumstances where such supply was economically feasible.

6. Refusal to Supply Scarce Goods.

6.1. The respondent concedes that the sawlogs constitute scarce goods but argued that the scarcity is self-created; in particular, that the appellant chose the respondent as its main supplier, that it insisted over the period on the delivery of volumes in excess of the sustainable yield of the plantation, knew that the volumes would inevitably be reduced, but failed to make timeous arrangements. It was further contended by the respondent that the goods were not so scarce that they were unattainable, that is other sources of supply were available. In this regard there was further evidence contained, for example, in an affidavit deposed to by Mr Andries Swart previously employed by the respondent and now a consultant who provided figures to show that the appellant was in a position to obtain sawlogs from other suppliers.

6.2. For the purposes of this dispute, particularly given that other suppliers may well

require far more costly transport, I accept that it has been established that the relevant goods (sawlogs) are scarce as contemplated in Section 8(d)(ii) of the Act.

6.3. The further question now arises as to 'refusal to supply' such scarce goods. In dealing with this issue, it is necessary to examine certain salient facts of this case. There has been a history of price dispute between the parties, consequent upon which the respondent purported to cancel the long-term contract.

6.4. The respondent continued in terms of the respective settlement agreements to supply the appellant with the guaranteed volumes. In 1993 the volume was 85 000m^3. It was agreed that this would reduce to 55 000m^3per annum; but in 1996 the parties agreed to the volume of 75 100m^3per annum until 31 March 2002. It undertook in terms of the ad hoc arrangement of 14 September 2000 to supply the appellant with the same volume of 6 675m^3per month.

Approximately five months later, the respondent advised the appellant that with effect from 1 May 2001 it would reduce the volume from 6 675$m^3$to 2 222m^3per month. The reasons advanced by the respondent were that these volumes could no longer be supplied on a sustainable basis and that it would otherwise lead to overfelling. According to the respondent this would infringe the provisions of the National Forests Act No.84 of 1998.

6.5. Mr Bowman, who appeared together with Mr Fasser on behalf of the appellant, attacked the construction which the Tribunal had placed upon Section 8 of the Act. His initial argument was directed to the **per se**nature of the prohibition against abuse of dominance. In this regard he referred to subsections 8(a) and (b) of the Act which provide:

"It is prohibited for a dominant firm to -

(a) charge an excessive price to the detriment of consumers;

(b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;

When Section 8(d) was compared to Sections 8(a) and (b), the only difference between these

provisions was that Section 8(d) recognised a technological or efficiency defence. Save for that possibility, Mr Bowman contended that all three sub-sections constituted a **per se**prohibition of the defined activity; hence the respondent's motive was irrelevant as was the consequences of its actions.

6.6. By relying on a passage by Areeda & Hovenkamp, the Tribunal misconstrued the meaning of the section. The relevant passage reads:

> "An 'arbitrary' refusal to deal by a monopolist cannot be unlawful unless extends, preserves, creates, or threatens to create significant market power in some market, which could be either the primary market in which the monopoly firm sells or a vertically related or even collateral market. Refusals that do not accomplish at least one of these results do not violate Section 2 (of the Sherman Act), no matter how much they might harm the person or class of persons declined service. Nor are such refusals an 'abuse' of monopoly power in the sense of using power in one market as 'leverage' to increase one's advantage in another market."

6.7. According to Mr Bowman this passage, which interprets US law cannot be employed to introduce a new meaning to the wording of a different piece of legislation, namely the Act. By relying on this passage which is part of a commentary on the US Sherman Act, the Tribunal had introduced a new set of requirements into Section 8(d); in other words it had converted a **per se** in which the test was purely a factual enquiry into an examination as to whether the respondent refused to so supply into an inquiry into the consequences of such a refusal.

6.8. Mr Bowman is of course correct to caution against comparative borrowing which is then wrenched from its legitimate structure and legal roots to provide support for a particular interpretation of the Act. It is this Act which this Court must interpret. As Mr Du Plessis, who appeared on behalf of the respondent, contended Section 8(d) must be interpreted with the aid of the definition section of the Act. Thus the term "exclusionary act" which is critical to Section 8(d) is defined as an act "that impedes or prevents a firm from entering into, or expanding within, a market".

6.9. The golden rule in construction of any statutory provision is to determine the intention of the Legislature. The whole Act must be looked at and the words must be understood in their everyday meaning unless such meaning is in conflict with the clear intention of the Legislature. As stated in **KBI v Van Rooyen v Execom Mining and Exploration (Pty) Ltd,** (1) SA 50 (NC), and I respectfully agree, the correct approach is that the provisions of the Act in question, in whole, have to be looked at and the Court or the relevant tribunal must also have regard to its (the Act's) scope and

object. (See also **Savage v CIR**, 1951 (4) SA 400 (A) and **Bolo v Royal Insurance Company of SA Ltd,** (3) SA 105 (E).

As there could conceivably be many acts by competitors occurring in a market, which could amount to normal acts of competition but which could have the effect of impeding or preventing a firm from entering into or expanding within a market, the definition of "exclusionary act", as employed in Section 8(d) could not have been intended to impart into the definition of "exclusionary act" the anti-competitive effect thereof. In other words, the definition of "exclusionary act" does not imply that an act which falls within the definition is automatically labelled as anti-competitive.

6.10. The wording of the Section 8(d) defence refers to 'the competitive effect of its act'. Thus the enquiry mandated by the legislature must turn on an examination of the consequences of the act rather than focus exclusively on the act of refusal to supply **per se.**

6.11. There are clear differences between Sections 8(a) and (b) on the one hand and Sections 8(c) and (d) on the other. Whereas Sections 8(a) and (b) concern exploitative abuses, Sections 8(c) and (d) deal with competitive abuses. There is also a clear difference between Sections 8(c) and 8(d). Whereas in Section 8(c) the complainant firm must tip the scale by virtue of the **onus**, the converse applies in Section 8(d).

6.12. In my view the Tribunal was correct to enquire into the effect of the act of refusal and, to this limited extent, the passage in Areeda and Hovenkamp's work served to illustrate the nature of the enquiry mandated by the section. To this extent such comparative borrowing can prove useful.

6.13. This construction of Section 8(d) necessitates an enquiry into the nature and effect of the act performed by the respondent and which the appellant alleges constitutes 'a refusal to supply'. Mr Du Plessis submitted that the respondent 'merely reduced [the appellant's] contractual volume from one of several ... plantations'. The Tribunal concluded that this did not amount to a refusal to supply. Mr Du Plessis contended that the respondent indicated its willingness to supply the appellant, not on a guaranteed basis but on an equal footing with other purchasers, without long term agreements, for the uncommitted volumes from the respondent's other plantations.

6.14. Mr Bowman submitted that there were undertakings by the respondent as late as September 2000 to supply the guaranteed volumes; that it was, in the circumstances suspect that the respondent claimed to be unable to maintain this supply but seven months later. He submitted further that, if that be the case, this would reflect on the **bona fides**of the respondent. In my view, this line of argument reinforces the conclusion that the entire dispute has far less to do with competition law and far more to do with a dispute about the nature of a contract seen to be advantageous to one party and disadvantageous to the other.

6.15. Significantly, the nature of the relief sought is couched in the form of a prayer for a specific performance. In essence, what the appellant seeks is for the respondent to honour its obligations and to continue supplying the particular volumes in terms of the agreement. I agree with the Tribunal that the correct forum to resolve this dispute is the civil courts and not the competition fora established for specific purposes under the Act.

7. Feasibility of supply.

7.1. There is a dispute of fact as to the economic feasibility of supplying the appellant with sawlogs from the Witklip plantation. According to the respondent the plantation is depleted. Hence the reduction of the volume to 2222m^3in order to avoid overfelling. It is submitted that it cannot produce the "guaranteed" volumes, but that the appellant can compete with other purchasers for the uncommitted volumes, amounting to 125 000m^3, from the other plantations in Mpumalanga.

7.2. It was submitted on behalf of the appellant that the argument by the respondent relates to long term sustainability and disregards the fact that the relief sought is for a limited period only. In my view of the conclusion to which I have come regarding the refusal to supply, this aspect of the dispute does not merit further consideration.

8. Conclusion.

8.1. The facts of this case reveal that the dispute turned upon a refusal by the

respondent to continue with appellants' guaranteed supply on the same terms and conditions. At the root of this litigation, there is a battle between the parties as to whether the appellant can demand a continued supply while simultaneously being entitled to resist an upward adjustment in the price of the supply.

8.2. The respondent has given an undertaking to continue supplying the appellant from its uncommitted volumes from other SAFCOL plantations, on the same basis and terms as other customers without long term contracts. The appellant would thus have to compete with these other customers.

8.3. On the interpretation that Section 8(d) does not constitute a **per se**prohibition as contended for by Mr Bowman, the question arises as to the existence of proof of an anti-competitive effect of a kind that can be distinguished from the consequences of a contractual dispute. In the context of a competition dispute based upon the provisions of the Act, the refusal to supply must be examined within the context of the concept of a prohibited practice. In this case the appellant cannot simply claim that the actions of the respondent constituted a **per se**prohibition without providing proper evidence which showed that the requirements of the section had been met. For this reason, the Tribunal was correct in its finding that the act complained of has not been shown to extend the market power of the respondent **qua**competition with the appellant and that the actions complained of had not been shown to fulfil the requirements of a prohibited practice.

8.4. In the light of the conclusion to which I have arrived, that the appellant had failed to show that a 'refusal to supply' scarce goods produced anti-competitive consequences, the appellant cannot succeed in obtaining the relief sought. Simply put, it has failed to show that the respondent was engaged in a prohibited practice.

9. Irreparable Harm.

The appellant has not met the first requirement for the relief sought, being proof of a prohibited practice. It is not necessary to make any finding about the other requirements needed to justify the relief sought . Suffice it to make the following

observations.

It was argued on behalf of the appellant that in effect failure to supply the 'guaranteed volumes' or an equivalent thereto would have disastrous effect on York's survival in the market.

Although not strictly necessary for my finding, I agree with the view expressed by the Tribunal that there is "no doubt that the impact on the business of York of a reduction in the supply of raw material of this magnitude would be significant". But the appellant can procure an equivalent of the "guaranteed volumes" from other SAFCOL plantations, by competing with other customers without long term contracts. Further, there is evidence to show that it could obtain some supplies from other plantations.

ORDER.

For the reasons set out above the appeal is dismissed with costs.

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MAILULA AJA

I agree.

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DAVIS JP

I agree.

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JALI AJA