

COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case Number: 41/CR/Jul01

In the matter between:

SAD Holdings Limited
SAD Vine Fruit (Pty) Ltd

First Applicant
Second Applicant

and

The Competition Commission

Respondent

In the referral:

The Competition Commission

Applicant

and

SAD Holdings Limited
SAD Vine Fruit (Pty) Ltd

First respondent
Second respondent

Reasons and Order

Introduction

This is an application brought by SAD Holdings Ltd and SAD Vine Fruit (Pty) Ltd ("SAD") to dismiss the complaint referred to us by the Competition Commission ("Commission") on 17 July 2001 on the basis that the Commission does not have jurisdiction to refer the complaint to us as it did not do so within the requisite one year period.

The Commission, in the complaint referral, allege that SAD has contravened the provisions of sections 5(1) and 8(d)(i) of the Competition Second Amendment

Act, No. 39 of 2000. We have not yet commenced hearing the complaint referral. However we decided to hear this application first as if it is successful it would dispose of the complaint referral.

Background

On 13 October 1999 the complainants, South African Raisins (Pty) Ltd ("South African Raisins") and Mr Slabber, filed a complaint of restrictive practice with the Competition Commission against SAD. The complaint was lodged in terms of section 44 of The Competition Act, No. 89 of 1998 ("the old Act")¹.

The Commission accepted the complaint filed by the complainants on 13 January 2000 in terms of Competition Commission Rules² 17(1) and (2). Rule 17, which prescribe the procedure to be followed when filing a complaint with the Commission, states as follows:

- 1) A person other than the Commissioner, by filing a completed Form CC1, may submit a matter to the Commissioner, if*
 - (a) the matter concerns a practice that meets both of the tests set out in Rule 16(a) and (b);*
 - (b) the submission is not frivolous; and*
 - (c) the Commissioner has not initiated or accepted a complaint in respect of that practice.*
- 2) Upon receiving a submission in terms of sub-rule (1), the Commission must either –*
 - (a) accept the submission as a complaint in terms of section 44; or*
 - (b) notify the person who made the submission that the Commission has rejected the submission as a complaint, and provide a brief written explanation for that decision.*

On the same day that the complainants filed their complaint with the Competition Commission they also launched an application for interim relief in terms of section 59 of the old Act with the Competition Tribunal. The Competition Tribunal granted interim relief to South African Raisins and Mr Slabber on 24 November 1999.³

¹ The Competition Second Amendment Act, No. 39 of 2000 came into affect on 1 February 2001.

² We will be referring to the rules and Act as they were prior to the amendment of the Act unless we state otherwise. See footnote 1 supra.

³ See Tribunal Case No.: 04/IR/Oct99

Thereafter the respondents in the Interim Relief case, SAD, brought an application to the High Court of South Africa in the Transvaal Local Division, inter alia, questioning the jurisdiction of the Competition Tribunal over the dispute between the applicants and the respondents. Ngoepe, JP delivered his judgement on 15 March 2000 and declared the orders made by the Tribunal as null and void and of no force and effect.⁴ Ngoepe JP based his decision on the fact that the respondents conduct was excluded from the application of the Competition Act as the Act, did not apply to “acts authorised or subject to public regulation” and since the raisin industry was subject to regulation in terms of the Marketing of Agricultural Products Act it was thus within the ambit of the exclusion and hence the Tribunal had no jurisdiction to make the orders it did. As a result of this judgement the Competition Commission decided to suspend its investigation into the main complaint on 15 March 2000. The Commission argued that since the judgment found that the Competition Act was of no application to the raisin industry and hence the Tribunal had no jurisdiction over the respondent to adjudicate an interim relief case, they for the same reason, had no jurisdiction to investigate the complaint under the Act. Thus the Commission interpreted the judgment as having stayed their jurisdiction.⁵

The complainants appealed the judgement of Ngoepe JP and on 29 September 2000 Melunsky, AJA of the Supreme Court of Appeal found that the Judge President erred in holding that the Tribunal had no jurisdiction to make the orders of 29 September 1999.⁶

The Competition Commission considered that the judgment of Melunsky AJA had “reinstated its jurisdiction”⁷ and so it re-commenced its investigation on 29 September 2000, i.e. 6 months and fourteen days after it suspended the investigation. According to the Commission’s calculations it referred the complaint to the Tribunal well within the one year period prescribed in Competition Commission Rule 19(2). They allege they did so, if one excludes the period in which their jurisdiction was ‘suspended’, exactly 11 months and 19 days after acceptance and hence their referral is timeous.

Jurisdictional point

Rule 19 of the Competition Commission’s rules states as follows:

⁴ Case No: 1930/00 of 15 March 2000.

⁵ See supplementary affidavit of Ibrahim Bah paragraph 2.7

⁶ Case No.176/2000 of 29 September 2000.

⁷ See supplementary affidavit of Ibrahim Bah paragraph 2.7

(1) The Commission must notify the registrar of the Competition Tribunal that a complaint has been initiated or accepted by the Commission on the earliest of the following dates, as applicable in a particular case:

- a) The date on which the Commissioner initiates the complaint.*
- b) The date on which the Commission accepts a submission in terms of Rule 17(2)(a).*
- c) The date on which the Tribunal determines in terms of Rule 1794) that a submission satisfies Rule 17(1).*
- d) The date on which the Commission publishes a notice in terms of Rule 18(1)(b).*

(2). Subject to sub-rule (3), the Commission must either refer a complaint to the Tribunal in Form CT 1(1), or issue a Notice of Non-referral in Form CC 8, no more than one year after the date on which the complaint was initiated or accepted, as the case may be, as reported to the Tribunal in terms of sub-rule (1).

(3) In a particular case –

- a) the Commission, and all claimants recognised at the time, may agree to extend the period allowed in sub-rule (2);*
- b) on application by the Commission, the Tribunal may extend the period allowed in sub-rule (2).*

(4) If the Commission has not referred a complaint to the Tribunal, or issued a Notice of Non-referral, within the time allowed by sub-rule (2), or sub-rule (3) if different, the Commission will be deemed to have issued a Notice of Non-referral on the expiry of the relevant time period.

(5) Upon issuing a Notice of Non-referral in terms of sub-rule (2), the Commission must deliver a copy of the notice to each claimant recognised at the time.

It is common cause between the parties that the Commission had to refer the complaint in casu to the Tribunal on or before the 12th January 2001, unless that period had been validly interrupted. It is also common cause that if the period between 15 March 2000 when Ngoepe JP delivered his order and 29 September 2000 when Melunsky AJA reversed that order constitutes a valid suspension of the one year period then the Commission would still be in time with its referral.

The issue that we have to decide is whether this six-month period constitutes a

valid suspension of running of the one-year period contemplated in Rule 19. If it does not, since the Commission does not seek to rely on any of the other grounds contained in Rule 19(2) for the extension of the one-year period, it will be deemed by virtue of the operation of Rule 19(4) to have issued a notice of non-referral to the complainants.

The respondents' argument is straightforward. The Commission's powers to investigate were not removed by the order of Ngoepe JP. In the first place the Commission was not a party to that litigation which was between the respondents and the complainants⁸. Secondly, notwithstanding the reasoning of the Court, the relief was limited to nullifying two orders made by the Tribunal in interim relief proceedings and had no bearing on the powers of the Commission. Thirdly the noting of the appeal by the complainants, the date is not given, in any event led by operation of law to the suspension of Ngoepe JP's order as in terms of High Court Rule 49(11). It states as follows:

49(11) Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on application of a party, otherwise directs.

Thus the respondents argue the Commission was never under any legal obligation to suspend its investigation and absent such compulsion its duty was to continue, notwithstanding that in his reasons Ngoepe JP had come to the conclusion that the Competition Act did not apply to the respondents.

Nor, they argue, could the decision be regarded as *res judicata* in respect of the Commission and the respondent. A judgment is only regarded as *res judicata*⁹ if it meets the following requirements:

- a) it is with respect to the same subject matter
- b) based on the same ground
- c) between the same parties.¹⁰

In this case the dispute is not between the same parties, as the Commission was not a party to the litigation between the respondent and the complainant, nor was

⁸ In the matter before Ngoepe JP the Tribunal was cited as a third respondent but the Tribunal did not oppose the application and agreed to abide by the decision of the court.

⁹ A matter is regarded as *res judicata* if an end has been put to a dispute by a decision of a judge.

¹⁰ See Lwasa Volume 9 paragraph 421 footnote 5 and the cases cited there.

the subject matter or the relief the same.

Thus the Commission they argue was not precluded by the litigation from investigating the complaint and hence the time period was never suspended.

The Commission argue that since the central finding of the High Court was that the Act did not apply to the raisin industry the effect was that the Commission would, based on the courts reasoning, have no jurisdiction to investigate the complaint as such an investigation was premised on the application of the Act.

Thus it was immaterial that they were not a party to the dispute and not prohibited from continuing by an express order of court. There was little point in investigating a matter to be brought before a tribunal, which the court had found had no jurisdiction. The suspension of the judgment by virtue of the appeal they said was irrelevant as this was not a case of an appeal concerning the payment of money or for relief. The Commission therefore acted properly in suspending its investigation until the SCA order of reversal.

One has a great deal of sympathy with the Commission's argument and it is hard to criticize its decision to suspend its investigation pending the outcome of the appeal. Were we vested with the discretion to condone the time period in Rule 19(2) we have no doubt that we would have done so.

The rule it is clear does not allow that discretion post facto and we could only extend the period during the one-year period if we were asked to do so on application in terms of Rule 19(3)(b)¹¹.

The Commission however relies for the existence of our discretion on section 58(1) (c) of the amended Act¹², which states:

58 (1). In addition to its powers in terms of this Act, the Competition Tribunal may –

(c) subject to sections 13(6) and 14(2), condone, on good cause shown, any non-compliance of –

i) the Competition Commission or Competition Tribunal rules; or

¹¹ That application would have to be made before the expiry of the one-year period. Whilst the sub-rule does not expressly require this, the logic of the section given the deemed referral in 19(4) dictates this conclusion.

¹² A similar provision is to be found in Rule 54(3) of the previous Tribunal Rules and Rule 55(3) of the current rule but whichever applies our conclusion remains the same.

(ii) a time limit set out in this Act.

This section however cannot be utilised to defeat non-compliance with threshold jurisdictional issues, which relate to whether the Tribunal or Commission have jurisdiction to determine a matter. The section applies to matters over which we already have jurisdiction and not those where jurisdiction may have lapsed. Nor does the express language of Rule 19(3), which as we have seen above provides for a specific time extension remedy, suggest that any other is appropriate in those circumstances.

At best for the Commission is a concession by the respondents that the time period could be regarded as suspended if the Commission were expressly precluded by operation of a court order that subsisted for the relevant period and in such a case we could read in to Rule 19 (2) a time period of one year in which the Commission could validly exercise its powers. Since as they have argued the Commission was not so subject, we are not required to make such a reading in.

Order

We come to the conclusion that the Commission was not precluded by operation of law from continuing its investigation and that in the absence of any discretion on our part to condone their non-compliance within the time period contained in Rule 19(2) their referral was not made in time.

We therefore find that:

1. The Commission has no jurisdiction to refer the complaint to the Tribunal;
2. They are deemed to have issued a notice of non-referral to the complainants.

South African Raisins and Mr Slabber, the complainants, however are not without a remedy. They are entitled, because of the deemed non-referral, to refer the complaint directly to the Tribunal should they so wish. Since the complainants, until this decision, were not in a position to exercise their rights to refer this dispute to the Tribunal, we rule that for the purpose of Rule 14(1)(b) of the Tribunal Rules¹³ the Commission will be deemed to have issued a notice of non-referral with effect from the date of this decision. The Commission is required to bring this fact to the attention of South African Raisins and Mr Slabber.

¹³ We refer here to the current Rules of the Tribunal.

There is no order as to costs.

N. Manoim

23 October 2001

Date

Concurring: D. Lewis and C. Qunta.