

# IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

Case No: 21/CAC/JUL02

In the matter between:

1.

**OLD MUTUAL PROPERTIES (PTY) LIMITED**

First Applicant

**OLD MUTUAL LIFE ASSURANCE COMPANY  
(SOUTH AFRICA) LIMITED**

Second Applicant

2.

and

**THE COMPETITION TRIBUNAL**

First Respondent

**NORMAN MANOIM N.O.**

Second Respondent

**AVALON GROUP (PTY) LIMITED**

Third Respondent

**VIDEOVISION ENTERTAINMENT (PTY) LIMITED**

Fourth Respondent

**PRIMEDIA LIMITED**

Fifth Respondent

**STER-KINEKOR FILMS (PTY) LIMITED**

Sixth Respondent

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## Judgment

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**Malan J:**

[1] This is an application for the review and setting aside of two decisions taken by the Second Respondent (“the Assigned Member”), allegedly on behalf of the First Respondent (“the Tribunal”), at or pursuant to a pre-hearing conference held on 24 June 2002.

[2] The first decision, and the order made by the Assigned Member as a result, related to the discovery of a lease between the Second Applicant and the Sixth Respondent and entailed an order that the Applicants are obliged to discover in terms of rule 22(1)(c)(v) the lease agreement concluded by the First Applicant and

the Sixth Applicant on 14 November 2001.

The second decision involved the refusal by the Assigned Member to set down certain points of law for hearing by the Tribunal and to adjourn proceedings pending resolution of those questions (in terms of Rule 21(2)(a)). The second decision itself involved three separate decisions, i.e. a separate decision not to refer each of the three alleged questions of law for separate hearing.

[3] The applicants contend that the aforesaid decisions of the Assigned Member were materially influenced by a mistaken understanding of the Tribunal's jurisdiction; and that both decisions were not rationally supported by the reasons given for them and evidenced a failure by the Presiding Member properly to apply his mind; and that the second decision falls to be set aside as a result of the Presiding Member's incorrect view of the nature of his discretion and the fact that he has committed the Tribunal to a procedure that is procedurally unfair to the applicants herein and contrary to the rule of law.

[4] The proceedings were initially opposed by both the Third and Fourth Respondents. In its answering affidavit the Third Respondent raised as a point *in limine* the question whether this Court had jurisdiction to hear this application for review. The following contentions were advanced to which I will again refer: based on the premise that this Court is not only established by the Competition Act 89 of 1998 but also derives its powers from the Act, this Court lacks jurisdiction in terms of ss 37 and 61 to review the decisions of the Assigned Member. His decisions are not decisions of the Tribunal and s 37(1)(a) limits the Court powers of review to decisions of the Tribunal.

[5] Since the filing of affidavits in this matter the Fourth Respondent has withdrawn its complaint against the Applicants and the Applicants have, in consequence, withdrawn their application in so far as it lies against the Fourth Respondent. This means that the second of the questions of law set out in the Applicants' notice in terms of rule 21(2) has effectively been withdrawn. The applicants have also given notice in paragraph 57 of their heads of argument that they will not be

pursuing the review against the Second Respondent's decision not to direct the Registrar to set down for separate hearing the third question of law.

This means that the issues to be dealt with in this matter are (1) the jurisdictional point *in limine*; (2) whether the decision of the Second Respondent to order discovery of the November 2001 lease falls to be reviewed and set aside; and (3) whether the Second Respondent's decision not to refer the first of the points of law for separate hearing falls to be reviewed and set aside. It is clear that a decision in favour of the Respondents on the first question, i.e. the point *in limine* dispose of the matter altogether.

- [6] At the hearing on 28 March 2003 we gave an order that the point in limine be upheld and that the appeal be dismissed with costs including the costs of two counsel. Reasons for the order were to follow. The reasons are set out hereunder.
- [7] The Competition Appeal Court is a court contemplated in s 166(e) of the Constitution with a status similar to that of a High Court (s 36(1)(a). It has exclusive and final jurisdiction in respect of certain specified matters (s 62(1) and (3) and see *Seagram Africa Ltd v Stellenbosch Farmers' Winery Group Ltd and others* 2001 2 SA 1129 (C) 1141F-1142I). However, it remains a "creature of statute and derives its powers, obligations and jurisdiction from the four corners of the statute" (compare *Venter v Compensation Commissioner* 2001 4 SA 753 (T) 757CF). Its powers are set out in s 37 of which subs (1) provides that it

may –

- a) review any decision of the Competition Tribunal; or
- b) consider an appeal arising from the Competition tribunal in respect of –
  - i) any of its final decisions, other than a consent order made in terms of section 63; or
  - ii) any of its interim or interlocutory decisions that may, in terms of this Act, be taken on an appeal.

Section 37(2) provides that the Competition Appeal Court “may give any judgment or make any order, including an order to –

- a) confirm, amend or set aside a decision or order of the Competition Tribunal; or
- b) remit a matter to the Competition Tribunal for a further hearing on any appropriate terms.

[8] It is clear that the powers of review and appeal given by this section are limited to reviews of or appeals against decisions of the *Competition Tribunal*. The Act does not allow for any uncertainty and expressly refers to the Tribunal’s decisions, not the decisions of any other functionary under the Act (see also s 61(1)). Proceedings of the Competition Tribunal are chaired by the Chairperson who is responsible to manage the case load of the Tribunal. He must assign each matter referred to the Tribunal to a panel composed of any three members of the Tribunal (s 31(1)). A decision of “the Chairperson or other person contemplated in subsection (5), or of a majority of the members of a panel in any other matter, is the decision of the panel” (s 31(6)). Section 31(5) provides for two special cases: “If the Competition Tribunal may extend or reduce a prescribed period in terms of this Act, the Chairperson of the Tribunal or another member of the Tribunal assigned by the Chairperson, sitting alone, may make an order – (a) extending or reducing that period; or (b) condoning late performance of an act that is subject to that period.” The decision of an Assigned Member pursuant to s 31(5) is a decision of the Tribunal (s 31(6)).

No other provision is made to equate the decisions of Assigned Members to decisions of the Tribunal. Compare also rule 3(4)(kk) of the Competition Tribunal Rules which defines “tribunal” as either (a) the body established by s 26; (b) a panel of the Tribunal convened under s 31(1); a member of the Tribunal sitting in terms of s 31(5); or the Registrar of the Tribunal. An Assigned Member has limited powers only. These powers derive from the Competition tribunal Rules and relate to pre-trial hearings in order to effectively manage matters before the Tribunal. For example, the Assigned Member may direct the Registrar to set a point of law down for hearing by the Tribunal (rule 21(2)). All the other powers given an Assigned Member by rule 22 concern matters of procedure and allow him or her to give directions to facilitate the hearing of a matter by the Tribunal.

The “pre-hearing conferences” need not follow formal rules of procedure and may be conducted in person or by telephone or in both ways (rule 21(4)). They are not open to the public (rule 21(4)). It is nowhere in the rules suggested that the decisions of an Assigned Member are decisions of the Competition Tribunal (except as provided for in s 31(6)). Assigned Members may play a role in pre-hearing merger proceedings (rules 35(3) and (4)) and they have been given certain powers relating to the joinder and substitution of parties (rule 45) and intervention (rule 46). They may also give directions as to the conduct of hearings (rule 55).

The legislature has in terms of s 37(1)(b) expressly limited the Competition Appeal Court’s power to hear appeals against decisions of the Tribunal to final decisions of the Tribunal and to such interim or interlocutory decisions that may be taken on appeal (s 37(1)(b)). There is nothing in the Act to indicate that the legislature intended to allow unlimited interlocutory reviews. The only provision in the Act allowing an appeal against an interim or interlocutory decision is s 49C(7) which provides for an appeal against the refusal by the Tribunal to grant interim relief in terms of s 49C. Should a procedural decision of an Assigned Member be prejudicial to one or more of the parties it could be remedied by the Tribunal in terms of rule 42 (read with ss 55 and 27(1)(d) and compare the remarks by Jali J in *Seagram Africa (Pty) Ltd v Stellenbosch farmers’ Winery group Ltd and Others* 2001 2 SA 1129 (C) 1140J-1141B).

[9] In support of their contention that this Court had the power to review the decisions of the Second Respondent complained of, counsel for the Applicants relied on the decision of this Court in *Anglo South Africa (Pty) Ltd and Others v The Industrial Development Corporation of South Africa Ltd and Others* (24&25/CAC/Nov02) that was delivered on 15 November 2002 by Davis JP, with Jali JA and Selikowitz JA concurring. It was held, first, that the power of a single member of the Tribunal in terms of rule 42 to allow a party to intervene was *ultra vires* the provisions of s 53(1)(c)(v) which authorises the Tribunal, and not any single member of the Tribunal, to recognise a person as a participant. Secondly, the Court held that the decision of the single member to appoint an expert was unacceptably wide. Davis JP said at pages 4-5:

“Rule 46(2) cannot supplant the provisions of the Act; hence when an Act does not empower a single member of the tribunal, who may not be a member of the designated panel, to make these kind of determinations, the Rule itself cannot then empower the single member to do that which is not expressly or by necessary implication provided in terms of the Act.

On this basis, the three related determinations, being the intervention decision, the determination as to scope, and the decision as to confidential information, were made by second respondent in circumstances which are *ultra vires* the Act. In short, there is nothing in the Act which empowered second respondent to make these determinations and they must

therefore stand to be declared invalid.”

Davis JP said with regard to the second issue at page 5-6:

“The wording of this particular ruling purports, in effect, to supplant third respondent’s own decision-making powers and to abrogate its own powers to an expert. An expert, in this case seventh respondent, in being asked to make a determination of the kind which the Act mandates third respondent to so make.”

“In these circumstances the ruling is unacceptably wide by reason of the scope of the instructions given to seventh respondent. This conclusion provides a second basis for the finding that the ruling must be set aside. “

It should be noted that the review jurisdiction of this Court was never raised nor argued in the *Anglo* . The parties seem to have assumed that the Court had such jurisdiction. The Court did not consider the matter nor made any finding in respect of its review jurisdiction. In these circumstances the matter is open to this Court to consider the issue.

For the reasons set out above the following order was made:

- 1                   The point in limine is upheld;
- 2                   The appeal is dismissed with costs including the costs of two counsel.

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**Malan J**

**Acting Judge of the Competition Appeal Court**

**Hussain JA and Jali JA concurred.**

**Counsel for Applicants: RO Petersen SC and PBJ Farlam**

**Attorneys for Applicants: Walkers Inc**

**Counsel for Third Respondent: CJ Pammenter SC and OA Moosa**

**Attorneys for Third Respondent: JH Nicholson Stiller & Geshen Attorneys**