

**IN THE COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: 49/CR/A/Jul00

In the large merger between:

**American Natural Soda Ash Corporation
1st Applicant**

**CHC Global (Pty) Ltd
2nd Applicant**

and

Botswana Ash (Pty) Ltd

1st Respondent

Chemserve Technical Products (Pty) Ltd

2nd Respondent

Competition Commission of South Africa

3rd Respondent

and

Botswana Ash (Pty) Ltd

1st Applicant

Chemserve Technical Products (Pty) Ltd

2nd Applicant

and

American Natural Soda Ash

1st Respondent

CHC Global (Pty) Ltd

2nd Respondent

Competition Commission of South Africa

3rd Respondent

Reasons for Competition Tribunal's Decision

Introduction

We have decided to combine our decisions on the two applications referred to above in this decision. The first is the one brought by Ansac for a declaratory order and the second by Botash in terms of Rule 47 of the Tribunals Rules of Procedure for leave to intervene in the Complaint Referral proceedings brought by the Competition Commission against Ansac and CHC Global Pty Ltd. We have done so because the two applications are interrelated and the decision in respect of the first led to the application and then the decision in respect of the second. To avoid confusion we have referred to the parties by name. References to Botash should be taken to include Chemserve Technical Products (Pty) Ltd and references to Ansac to include CHC Global (Pty) Ltd.

Background

In October 1999 Botash launched an application for interim relief in terms of section 59 of the Act against the respondents. Ansac opposed the application and also launched its own application for interim relief against Botash.

The proceedings in both applications became protracted due to several interlocutory issues that arose and by February 2000 neither had been heard. The parties then met and came to an agreement on the future conduct of the litigation. On 10 February 2000 on application by the parties we made their agreement an order of the Tribunal.

The gist of the agreement is that the parties would withdraw their respective interim relief applications subject to certain conditions. The Commission agreed to finalise its investigation into Botash's complaint by 22 March and by that date to elect to either refer the complaint to the Tribunal or to issue a notice of non-referral to Botash. Among the other more salient conditions were that Botash was entitled –

1. to intervene and fully participate in the complaint proceedings if the Commission referred the Complaint to the Tribunal; and in that event.

2. to file a separate statement of particulars of its complaint, where after the

normal rules and time periods relating to answer and reply would apply.¹⁽¹⁾

Ansac was entitled to reciprocal rights in terms of its counter application, but as they have not yet chosen to exercise these rights we will for convenience only refer to Botash's rights.

The Commission filed its complaint referral on 14 April 2000. Since then Ansac has filed its answering papers and the Commission has replied. On 25 May Botash served intervening particulars of complaint on both Ansac and the Commission. The Commission responded with a letter dated 9 May (presumably 9 June) addressed to Botash's attorneys stating "*the filing of the above mentioned document is not competent within the provisions of the Act and/or the Rules.*" The Commission went on to say that for this reason it would not be replying to the document and "*would not expect a reply from the respondents*".

Thereafter the parties entered into an exchange of correspondence, which it is unnecessary for us to go into, except to observe that –

1. the Commission remained adamant that Botash's intervention was irregular.
2. Botash relied on the Tribunal's February order to assert its entitlement to intervene and file its particulars and argued that no further procedural clarity was required or necessary.
3. Ansac watching from the sidelines asked Botash to clarify its position with the Commission.

Ansac's request fell on deaf ears and so they approached the Tribunal for an order seeking declaratory relief. Ansac had no strong views on the debate between the Commission and Botash but sought guidance over what it should do.

Discussion

At the hearing of the application we ruled that Botash was required to bring an application to intervene in terms of Rule 47 of the Tribunal's Rules of Procedure. The reason for this is although our February order purported to give them this right, Rule 47 which creates the right to intervene requires as a prior jurisdictional fact that an initiating document has been filed. In the case of Complaint Procedures the initiating document is the Complaint Referral. When we gave our order in February no Complaint Referral had been filed. Despite this we were urged by Botash's counsel that we were entitled to give the order in terms our wide powers under section 55 which states.

"Subject to the Competition Tribunal's rules of procedure, the Tribunal member presiding at a hearing may determine any matter of procedure for that hearing, with due regard to the circumstances of the case and the requirements of section 52(2)."

It was also pointed out that we have wide powers to condone any technical irregularities in our proceedings in terms of section 60(1)(c) of the Act and Rule 54(3) of our Rules.

This argument may well be correct, but we decided that since the Rules make specific provision for intervener proceedings in view of the Commission's opposition we should adhere to them not out of a want for formality but in order to have an opportunity to consider the merits of the Commission's objections.

Accordingly we ruled on the Ansac application that Botash should apply to intervene in terms of Rule 47 notwithstanding the February order. Although Rule 47 requires that the application be made on Notice of Motion setting out the intervening party's interest in the matter, we decided to condone non-compliance with the strict letter of the Rule since –

1. Botash's interest was already a matter of record from both the section 59 proceedings and Botash's complaint referral; and
2. both the other parties were present and represented.

Botash then brought the application to intervene, which was opposed by the Commission, but not Ansac.

We decided to grant the application for the following reasons:

Firstly all the parties had agreed to Botash's right to intervene in these proceedings and more particularly to file its own complaint referral if it wished to. The Commission's counsel, who it must be pointed out was not present when the February order was granted, argued that the Commission had agreed to no more than to refer the complaint or issue a notice of non-referral by the 22 March 2000. It was not a party to the agreement and therefore not bound by it. Botash's counsel vigorously disputed that and says the Commission was fully apprised of the contents of the agreement and supported it. The Commission was cited as a party to the section 59 proceedings and was present when the order was granted. Our records show that the proceedings, which commenced on 9 February, were adjourned until the 10th of February to allow the parties to consult the Commission who were not present on the 9th. Our records also show that the Commission was represented on the 10th.

We are satisfied that the agreement was concluded with the Commission's concurrence in February. The importance of holding the parties to the agreement in this case is that Botash withdrew its right to pursue interim relief subject to this concession. Had its role in the complaint proceedings been diminished to that of complainant seeking a more limited intervention it most certainly would not have withdrawn.

Not to uphold this agreement would result in a substantial injustice to Botash, which in an effort supported by us to prevent further prolixity of these proceedings had elected to forego its rights.

The Commission also opposed the application on the basis that Rule 47 requires that intervention only be granted if the interests of the person are not already represented by another party. In this case they argued that because the Commission has filed a complaint referral, the Commission represents Botash's interests.

Botash disputed this as well and pointed out that the respective Complaint referrals filed by them and the Commission manifest important differences in approach. An examination of these two Referrals bears out this contention.

Botash aver that Ansac has transgressed both sub-sections 4(1)(b)(i) and (ii). The Commission confine themselves to the former. Botash seeks relief by way of interdicting the operation of Ansac in South Africa, whilst the Commission seeks a fine.

Botash were denied the right to intervene its interests in this case would not be represented and having forgone an attempt to gain interim relief would certainly be prejudiced. Nor would it be able to represent its interests through any intervention less than the filing of its own Referral.

The Commission also argued that there is no basis for allowing an intervener to file its own complaint referral, either in terms of the Act or in terms of Rule 47. We disagree. The absence of express language in Rule 47, providing for an intervener's rights to file a referral is not significant. Indeed the equivalent rule in the High Court, Rule 12, does not make any specific reference to pleadings either, yet as Erasmus observes

"Having obtained leave to intervene, the intervener must file appropriate pleadings according as to whether he is co-plaintiff or co-defendant"^{1[2]}

Erasmus also observes that having been granted leave to intervene an intervener enjoys the same rights as other parties unless these rights are specifically curtailed.

Tribunal Rule 47 (2) gives us the discretion to allow a party to intervene " subject to any limitations..." and goes on to say in 47(2)(a)(ii)

"on the matters with respect to which the person may participate, or the form of their participation;"

An intervener's right to file a Complaint Referral is consistent with the rule.

Nor is an absence of an express right in the Act surprising as the Act does not provide for pleadings at all, these are a matter for the Rules.

A complainant is in any event allowed to participate in hearings of the Tribunal in terms of section 53(b). It is perfectly consistent with that right to allow a complainant in the appropriate circumstances the right to file pleadings as well. Indeed since the very purpose of pleadings is to help define issues in advance of the hearing such a step can help make the Tribunal's procedures more orderly and fair as it would constrain a complainant's section 53(b) rights in the same way as the Commission's and the respondent's are.

Having said that we are not unsympathetic to the Commission's concerns that well resourced complainants may routinely insist on intervention rights in all complaint referrals thus diminishing the Commission's status as the primary party in complaint referrals. They fear we are "privatizing" what is intended to be a proceeding at the public instance. We respect this view and we would point out that our decision is not intended to create a vehicle for automatic intervention if the Commission refers a complaint and the complainant wishes to become involved as a "co-plaintiff". More constrained rights of intervention may be appropriate in other circumstances. We should also not lose sight of the fact that our Rules also provide for pre-hearing conferences, whose function is to ensure the proper management of our hearings. Issues around the extent of intervenor's rights can be addressed at this stage as well. This decision, however, has been made on the grounds of the unusual history of the proceedings of this case. The Tribunal will consider each application for intervention on its own merits.

At the same time we cannot lose sight of the fact that complaint proceedings impact crucially on the rights of a complainant viz. their rights to appeal^{1[3]} and to commence a civil action for damages.^{1[4]}

The right to appeal is granted in terms of section 58 to a "*participant in a hearing referred to in section 53*". As we have seen, a complainant in a matter is a participant as of right. However such a right must be given content. If the Commission has narrowed the ambit of the case as in this instance the complainant's rights are not only curtailed in the Tribunal's' hearings but also on appeal if they are not afforded a right to intervene with a Complaint referral if it differs with the Commission on the ambit of the case. The same applies in the case of a civil action. An action for damages is only competent in a civil court and then only after the Tribunal or Court has determined that there has been a prohibited practice and what section of the Act has been contravened. Thus in this case it is possible that the Tribunal could find a contravention of section 4(1)(b)(ii) of the Act but not 4(1)(b)(i). Since the Commission as we have seen has not alleged a contravention of 4(1)(b)(ii), the complainant if it had not been allowed to intervene may have been denied relief a Tribunal would have been willing to give. In much the same way it could have been denied its rights to claim civil damages which are contingent on a finding by the Tribunal in relation to a

specific section of the Act, nor is the complainant at liberty to just bring a new complaint in these circumstances, as there are limitations on bringing a further action in terms of section 67 of the Act.^{1[5]}

Whilst the Tribunal will always be mindful of the Commission's primary role in complaint proceedings it chooses to refer, we cannot ignore in appropriate circumstances, the impact on a complainant's rights when determining the justification for and extent of an intervention.

N.M. Manoim

7 September 2000
Date

Concurring: D.H. Lewis and P.E. Maponya